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JURISDICTIONAL STATEMENT

This is an appeal from the judgment and sentence entered by the Circuit Court for the City of St. Louis wherein Appellant Thomas Graham, following a jury verdict of guilty to a charge of sodomy in violation of §563.230 RSMo 1969 (repealed), received a sentence of twenty years imprisonment. This Court has exclusive jurisdiction over this appeal pursuant to Article V, §3 of the Missouri Constitution, because this case involves a challenge to the constitutional validity of §563.230 on the grounds that it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution in that §563.230 proscribes the act of sodomy under any and all circumstances, and therefore is unconstitutionally overbroad under *Lawrence v. Texas*, 539 U.S. 558 (2003). The circuit court construed the statute as applicable to statutory sodomy, which was an improper, unconstitutional judicial revision of the statute that invaded the province of the General Assembly and created an unconstitutionally vague statute that fails to provide law enforcement with the guidance necessary to avoid arbitrary and discriminatory applications of the statute such as occurred in this case.

STATEMENT OF FACTS

A.

Procedural History

On December 17, 2002 Appellant Thomas Graham, a Roman Catholic priest, was indicted by a grand jury in the City of St. Louis for sodomy in violation of §563.230 RSMo 1969 (repealed). The indictment alleged that the act occurred "on or between January 12, 1975 and December 31, 1978." (LF 14).[1] On May 12, 2003, Graham filed a motion to dismiss the indictment on the grounds that the prosecution was barred by the three-year statute of limitations in §541.200 RSMo 1969 (repealed). (LF 22-23). The latter motion was denied by the trial court (Cohen, J.) on June 27, 2003. (LF 36). Graham moved for rehearing and, on November 17, 2003, the trial court (Baker, J.) dismissed the indictment as barred by the statute of limitations. (LF 55).

The State appealed. The Missouri Court of Appeals for the Eastern District reversed. *State v. Graham*, 149 S.W.3d 465 (Mo.App.E.D. 2004). It held that there is no statute of limitations for the crime of sodomy under §563.230. The court of appeals concluded the applicable statute of limitations was §541.190 RSMo 1969 (repealed), which provided that: "[a]ny person may be prosecuted, tried and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense shall have been committed." The punishment for §563.230 was "imprisonment in the penitentiary not less than two years." Since §563.230 did not specify a maximum term of imprisonment, the court of appeals reasoned that the crime

could be punished by imprisonment for life. Therefore, it concluded that, pursuant to §541.190, there was no limitations period for prosecutions under §563.230. (LF 57-66). This Court denied transfer on December 21, 2004.

On June 9, 2005, Graham moved to dismiss the indictment on the grounds that the repealed statute under which he was charged, §563.230, was unconstitutionally vague and overbroad in that it proscribed conduct that the U.S. Supreme Court found constitutionally protected under *Lawrence v. Texas*, 539 U.S. 558 (2003). The motion relied in part on this Court's opinion in *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005). (LF 78-80). The trial court (McCullin, J.) denied the motion on July 20, 2005. Characterizing Graham as "charged with performing oral sex on a minor,"[2] (LF 91), the court rejected the vagueness argument in reliance on this Court's opinion in *State v. Crawford*, 478 S.W.2d 314 (Mo. 1972). It further held that Graham lacked standing to assert the statute was unconstitutionally overbroad. (LF 91-96).

Graham's motions in limine were heard on August 25, 2005. The trial was bifurcated into guilt and penalty phases and began on August 29, 2005. The State called Lynn Woolfolk, Detective Mark Kennedy and Jeffrey Lodermeier in its case-in-chief. The trial court denied Graham's motion for a directed verdict at the close of the State's

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[1]The designation "LF" shall refer to Appellant's legal file.

[2]In fact, the indictment makes no reference to the act occurring with a minor. (LF 14).

evidence. (LF 99; Tr. 477).[3] Graham then testified in his own defense and called Patrick and Leo Rice as defense witnesses. The trial court (Quigless, J.) denied Graham's motion for a directed verdict at the close of all the evidence. (LF 101; Tr. 587). A summary of the guilt phase testimony appears in Section B of this Statement of Facts.

During the instruction conference, Graham objected to Instruction No. 5, the verdict director, which was not an MAI-CR 3d approved criminal instruction. That verdict director stated in relevant part that if the jury found beyond a reasonable doubt "[t]hat on or about January 12, 1975 to December 31, 1978, in the City of St. Louis, State of Missouri, the Defendant placed his mouth on the penis of Lynn Woolfolk then [it] will find the Defendant guilty of sodomy." (LF 106). Defense counsel objected to the instruction on the grounds that it was unconstitutionally vague and overbroad, lacked a mens rea requirement, did not require that the victim be of a certain age, and did not require that any sort of force be used. The trial court overruled the objection. (Tr. 591-92). Defense counsel also objected to the admission and publication to the jury of State's Exhibit 7, which had been referenced in the testimony of Woolfolk as a letter he wrote to the Archdiocese. The objection was overruled, and the prosecutor asked the jury twice during closing argument to read the letter. (Tr. 595-96, 609-10, 632) After eighteen minutes of deliberation, the trial court received a request from the jury for "evidence #7

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[3]The designation "Tr." shall be used for references to the transcript from the trial. Appellant's record on appeal includes transcripts from hearings on 11/17/2003, 6/16/2005, 8/25/2005 and 11/17/2005. Transcripts from those hearings are referenced by the date followed by "Tr."

letter from Lynn Woolfolk & all of the pictures introduced as evidence." (LF 103; Tr. 633). Noting the prior objection by the defense to publishing Exhibit 7 to the jury, the trial court sent Exhibit 7 to the jury room. After approximately 2 ½ hours of deliberation, the jury returned a verdict of guilty. (Tr. 633-36).

The State then announced that it was going to call two witnesses in the penalty phase. The defense objected that it had not received any endorsement of witnesses beyond those that appeared in the indictment, which did not include the names of the State's proposed penalty phase witnesses, Michelle Telle-Capstick and John Rohan. The trial court nevertheless permitted Capstick and Rohan to testify. The defense called Thomas Mickes, Father Edward Rice, Vincent Rice, Sergeant Patrick Rice, John Lang and William Finnegan as penalty phase witnesses. A summary of the penalty phase testimony also appears in Section B of this Statement of Facts.

Prior to closing arguments in the penalty phase, the prosecutor indicated he would not split his argument. (Tr. 717). In his argument, he did not recommend a specific punishment. Defense counsel then asked the jury to sentence Graham to the statutory minimum, two years. (LF 724). The prosecutor, despite his earlier representation, was then afforded time for rebuttal and argued that 25 years would be an appropriate sentence. (LF 724-25). The defense had no opportunity to respond. The jury returned a verdict of 20 years imprisonment. (LF 117).

Graham filed a timely motion for judgment of acquittal notwithstanding the verdict or in the alternative for new trial or reduction of punishment. (LF 123-175). The trial court denied Graham's post-trial motions. (LF 179; 11/17/05 Tr. 16). Graham's

sentencing hearing occurred on November 17, 2005. The trial court sentenced Graham to 20 years in the Missouri Department of Corrections, the sentence recommended by the jury, and continued Graham on bond. This appeal followed.

B.

Trial Testimony

Because this case raises issues regarding the prejudicial admission of evidence, a resume of the testimony of each witness is included below.

1.

Guilt Phase Testimony

(a) *Lynn Woolfolk*

Lynn Woolfolk, whose date of birth is January 12, 1962, was 43 years old at the time of trial. (Tr. 249). He was raised as a Catholic by his adoptive parents and at one time attended St. Mary's Grade School in Bridgeton, Missouri, where Graham was associate pastor. Woolfolk described Graham as close to the family and in particular to his mother. Graham came over "whenever the family needed a Baptism, Confirmation, First Communion, a funeral, he was always the one who was called on." (Tr. 254).

Woolfolk testified that his mother was pleased to see him spend time with Graham. Graham on occasion would drive Woolfolk to a farm in North County where Graham kept a horse. Woolfolk could not recall how old he was when he first went to the farm. (Tr. 256). When asked if there was anything he recalled about the trips to the farm that he did not care for, Woolfolk responded that Graham while driving the car

would have Woolfolk sit on his lap and then "pretended to teach me how to drive." He testified that Graham would then put his hands on Woolfolk's pants and touch his "penis and [his] genitals." (Tr. 257-58). This would occur while they were driving down Lindbergh Boulevard. (Tr. 310). Woolfolk did not recall how many times he went to the horse farm or how many times he was fondled, but he testified it was more than once. (Tr. 258). Woolfolk stated he never told his mom about it because he was "confused" and a priest was "next to God almost." (Tr. 259-60).

At some point Graham was transferred to the Old Cathedral on the St. Louis Riverfront. (Tr. 261). Woolfolk testified that "quite a few times" he would go with Graham to the Old Cathedral when he was "[a]round 13, 14." (Tr. 261-62). Woolfolk said the first time "something happened" was when Graham took him to Graham's quarters and "proceeded to caress me and take my clothes off." (Tr. 264). At this point he had known Graham "[q]uite a few years." *Id*. Woolfolk testified that Graham then put his hands and mouth on Woolfolk's penis. Woolfolk said that he did not have any idea why Graham was doing this. He testified that he was confused and did not question or resist Graham. Woolfolk testified that he didn't know if this was something he could talk to his parents about; in any event, he did not inform them. (Tr. 267-268). According to Woolfolk, similar sexual contact occurred on other occasions at the Old Cathedral, but he could not remember how often. (Tr. 269).

In the 1980s Woolfolk never told anyone about these sexual acts with Graham at the Old Cathedral. During the 1990s, while on a trip with a friend, Jeff Lodermeier, Woolfolk heard a story on the radio about abuse involving a bishop in the area they were

visiting. He then told Lodermeier he had been abused, but he did not give him any details. (Tr. 270-72). Later, on July 4, 1994, at the V.P. Fair on the St. Louis Riverfront, he told Lodermeier that the riverfront was "where my virginity was robbed from me." (Tr. 274).

Woolfolk and Lodermeier, that same weekend, drove to Jefferson Barracks Cemetery. Woolfolk had recently learned his natural father was buried there. As they approached the cemetery they saw a sign for St. Bernadette's Church. Woolfolk testified that he had heard that Graham was assigned to St. Bernadette's, but that he had no idea where the church was located and that he and Lodermeier were not looking for it. When they came upon the church, Woolfolk told Lodermeier "that's where he's at," and they pulled into the parking lot. They saw Graham standing in the parking lot with five kids around him, which made Woolfolk "sick to [his] stomach" "[j]ust thinking if one of them kids was being abused." (Tr. 277). Woolfolk and Lodermeier then proceeded to the cemetery. At the cemetery, Lodermeier told Woolfolk that he needed to talk to Graham and left. When Lodermeier returned, they both decided to go to St. Bernadette's. Lodemeier went to the rectory and returned with Graham. According to Woolfolk, Graham put his arm around him and asked how he was doing. He, Lodemeier and Graham then returned to the rectory. (Tr. 279-80).

Woolfolk described the conversation in the rectory. Graham asked him why he was there. Woolfolk responded by saying that Graham shouldn't have to ask. According to Woolfolk, Graham then asked "why now" and if his mother knew. Woolfolk replied

that he had told her. Woolfolk testified he waited for an apology, did not get one, and then left. (Tr. 280-82).

In 1996 Woolfolk retained a lawyer and filed a civil suit seeking "like $25,000." "I wasn't actually asking for money. It was the only way to try to hold him accountable for his injustice." (Tr. 288, 354). On at least four occasions during his direct examination Woolfolk denied it was his intent to get rich on the basis of his allegations against Graham. (Tr. 288, 293, 296, 299). He thought this first suit was voluntarily dismissed in 1998. He testified that it was his attorney's decision to dismiss the first suit. He then obtained another lawyer who refiled the suit. (Tr. 289-90). That lawyer ultimately counseled that Woolfolk dismiss the second suit because "the laws in Missouri would be hard to overcome and that the Archdiocese had deeper pockets then (*sic*) I did." (Tr. 291).

On cross-examination Woolfolk testified that between the first and second suit, on or about October 7, 1998, he had a letter presented to the Archdiocese seeking $30,000. The letter was ultimately marked State's Exhibit 7. He acknowledged that in the letter he stated that if the Archdiocese paid him that sum with no lawyers involved it would never hear from him again. (Tr. 357, 361-62). On redirect he testified that the letter indicated his goal was to get an apology and reimbursement for his current and future therapy sessions. It stated that he never wanted to file a lawsuit against the church, that he didn't do it for the money, that he filed suit out of anger and that "[h]e wanted justice to be served." (Tr. 376-78). On re-cross Woolfolk read into the record a portion of the letter that discussed the death of one of his best friends and how that event and a Catholic mass

in a poor village in a foreign country, where he heard "something or someone" say forgive, resulted in a decision to dismiss the first lawsuit. (Tr. 386-88).

Woolfolk testified he was not happy to dismiss the second suit in 1999 and that as a result he would never be able to collect any money for the abuse inflicted on him at the Old Cathedral. (Tr. 293-94). In 2002, Woolfolk responded to a television newscast wherein Circuit Attorney Jennifer Joyce asked abuse victims to call her office. He testified he did not do so to get money, but to get his day in court and to get accountability. According to Woolfolk, had he received an apology ten years ago, he probably would not be testifying in court. (Tr. 296-97).

(b) *Detective Mark Kennedy*

Detective Mark Kennedy of the St. Louis Police Department was assigned to investigate Woolfolk's allegations regarding Graham. He interviewed Woolfolk and then attempted to interview individuals who would have been at the Old Cathedral when Graham was assigned there. Bishop John Wurm, who was pastor at the Old Cathedral during that period, was dead. Florence Herre, who Detective Kennedy described as the housekeeper, was in a nursing home suffering from dementia. (Tr. 401). Ultimately he was unable to find anyone alive who could assist his investigation. (Tr. 424). Nor was he able to collect any physical evidence. (Tr. 426). He was able to confirm Woolfolk's description of the interior of the Old Cathedral, but no one could tell him which of the priest quarters had been occupied by Graham. (Tr. 402-06).

(c) *Jeffrey Lodermeier*

Jeffrey Lodermeier testified he had a close, intimate relationship with Woolfolk dating back to the early 1990s. (Tr. 434, 452). They met when Lodermeier was a Jesuit seminarian. (Tr. 452). Woolfolk first told Lodermeier that he was sexually abused by a priest when the two were traveling together in New Mexico. Later at the 1994 V.P. Fair, Woolfolk pointed out the Old Cathedral as the place where he had been abused. (Tr. 435-36). His version of the conversation with Graham at St. Bernadette's was similar to Woolfolk's. (Tr. 447-50).

(d) *Father Thomas Graham*

Father Thomas Graham testified that he was ordained as a Roman Catholic priest on April 2, 1960. In 1966 he was assigned to St. Mary's Parish in Bridgeton. (Tr. 480-81). Soon after he arrived at St. Mary's, he was approached by Woolfolk's mother, Lucy, who was involved in restoring an old cemetery that had been associated with an African-American church in nearby Robertson. Graham agreed to help and as a result became acquainted with the Woolfolk family. (Tr. 482-484). His first recollection of Lynn Woolfolk is baptizing him when he was around four. (Tr. 485).

Graham kept a horse on a friend's property from 1964 to 1980. He had access to the barn and an unoccupied house on the property throughout that period. (Tr. 489-90). He generally traveled to the property daily to care for his horse. (Tr. 492). He had no specific recollection of taking Woolfolk to the property, but he acknowledged that he took him there to see the horses. (Tr. 497, 545). The trips would have been when Woolfolk was a teenager because their purpose was to clean out the stables. (Tr. 500-01).

Graham testified that when he was transferred from St. Mary's to St. Pius on South Grand, he would occasionally stop by the Woolfolk house because it was along the route to the horse barn. (Tr. 498).

In 1975 Graham was transferred from St. Pius to the Old Cathedral. On a visit to the Woolfolk home, Lynn Woolfolk expressed an interest in seeing the Old Cathedral and Graham took him there on occasion. Woolfolk liked a model railroad layout that Graham had in the basement of the Old Cathedral. (Tr. 504). Graham and two bishops occupied the priest quarters. There were also a live-in housekeeper and a guest room that was sometimes occupied. (Tr. 507-08). There was a museum associated with the Old Cathedral that was staffed and open during the daylight hours. (Tr. 509). In the summertime and on weekends during the winter, there were also parking attendants who were students from St. Cecelia's Parish. Graham's quarters consisted of a living room with an archway into his bedroom. He maintained a model railroading workshop in his bedroom. (Tr. 513). He generally kept his door open and Woolfolk and other individuals, such as the parking attendants, would have had access to his quarters. (Tr. 514).

Graham testified he never fondled Woolfolk, let alone while driving down Lindbergh Boulevard. (Tr. 514). He testified he never touched Woolfolk in a sexual or inappropriate manner. He denied ever engaging in any type of sexual activity, including the oral sex that Woolfolk described. (Tr. 536-37).

In 1980 Graham was assigned to open the new St. Alban's Parish. (Tr. 519). He at one point confronted Woolfolk about his homosexual lifestyle, which Graham

described as contrary to the teachings of the Catholic Church. (Tr. 522). After that confrontation, Graham would on occasion see Woolfolk at the annual mass at St. Mary's Cemetery and at family funerals at which Graham would preside at the request of Woolfolk's mother. Those meetings were amicable. (Tr. 523-24).

Graham recalled the encounter with Woolfolk and Lodermeier at St. Bernadette's. He described how Lodermeier came to the rectory and asked to speak with him. Lodermeier then said he had a friend who had been molested and he wanted to know what to do about it. "[H]e would jump up and look at me and I thought, geez, there's something wrong with this guy," and he thought he might be from a nearby halfway house. (Tr. 526, 528). Graham then ushered Lodermeier out explaining that he had to assist with Communion at Mass. (Tr. 527).

Graham testified that sometime later he heard another knock on the door. It was Lodermeier again and he said, "I forgot to tell you that he's a priest." Graham responded that there was not much he could do unless the person who claimed abuse came to talk to him. Lodermeier responded, "He's here now," and he led Graham to a car that Woolfolk exited as they approached. (Tr. 529). Graham testified that he tried to say hello to Woolfolk but he was belligerent; Graham invited them into the rectory. Once inside Woolfolk stated "you molested me at the Old Cathedral." Father Graham recalled responding, "Oh, is that right?" He did not think Woolfolk was serious and said, "What does your mom think about all of this?" Woolfolk said she was disappointed. Graham then said, "Well, now, Lynny, if I did this to you how come you haven't said anything to me for all of these years?" Graham recalled Woolfolk responding that every time he saw

Graham people were around him. Graham retorted, "That's baloney." They then left with Lodermeier saying "now you can baptize all you want." (Tr. 530-32).

(e) *Patrick and Leo Rice*

The defense then called two brothers who as students worked at the Old Cathedral with Graham. Patrick Rice is a Sergeant with the St. Louis Police Department. He testified that he worked year-round at the Old Cathedral from approximately 1974 to 1977. He described it as a place where someone was always present working. There was a janitor, live-in housekeeper, and teenage parking attendants who would constantly search Graham out in his office or living quarters to deal with problems. (Tr. 564-71). "[I]t's a downtown tourist attraction. A lot of homeless people. There was always problems." (Tr. 571).

Leo Rice, who is employed by the City of St. Louis, worked at the Old Cathedral from 1977 to 1980 and reiterated that there was always someone working at the Old Cathedral. Leo would frequently have to seek out Graham in his living area, including the bedroom area where Graham would work on his model trains. Occasionally he would watch television with Graham in his living quarters. (LF 577-82).

2. *Penalty Phase Testimony*

(a) *Michelle Telle-Capstick*

Michelle Capstick at the time of trial was a 53-year-old resident of Muncie, Indiana. Up until the time she was 18, she lived in Ferguson, Missouri. She met Graham when he was assistant pastor of Good Shepherd Parish, and she testified that her earliest memory of Graham "is his sodomizing me" in the rectory when she was in the third or

fourth grade. She had been sent by a nun to the rectory to tell Graham the time of the Christmas play when he orally and anally sodomized her and then told her it was her fault and she would never be forgiven in the confessional. She testified that Graham's failure to repent and acknowledge the act has interfered with her "conjugal rights with [her] husband." (Tr. 642-46).

On cross-examination Capstick said she had forgotten about the assault but it had come back to her about three years ago when a man came into the Pizza King where she works whom she "projected to look like Father Graham 35 years later." (Tr. 650). When she later had sex with her husband, who had red pubic hair like Graham, she recalled "two counts" and since that time she recalled more. She now also recalled that when she was in the sixth grade Graham sodomized her in the rectory while she was being raped by another priest and that when she was in high school Graham raped her again at or on the way to a teen town. She also testified that another priest raped in her in the first grade while a nun kept slapping her because she would not cooperate with the priest. (Tr. 648-63).

(b) *John Rohan*

Rohan at the time of trial was 44 years old. He attended Catholic School at St. Mary's in Bridgeton. He testified that when he was at St. Mary's in the 6th, 7th or possibly 8th grade, Graham on numerous occasions would take him out of class so he could go to the stables and ride horses. On these occasions Graham would have Rohan sit on his lap while he was driving and touch Rohan's genitals. (Tr. 667-68). Rohan told his mom and dad, but they did not believe him and his dad beat him for reporting this

conduct. He testified that he would drink the sacramental wine with Graham in the sacristy. He left the Catholic Church and said he is ashamed any time he sees a priest. On cross-examination Rohan testified that he first reported his allegations in 2003 to the Bridgeton police.

(c) Witnesses Called on Behalf of Father Graham

Attorney Thomas Mickes testified that he was 12 years old when he first met Father Graham. He served 6:30 a.m. mass with Graham almost every day when he was going into the 8th grade. He also went horseback riding on occasion with Graham. Graham never made him feel uncomfortable and he never heard rumors that Graham was someone he needed to stay away from. He maintained his association with Graham over the years and regards him as a role model. (Tr. 684-89).

Father Edward Rice at the time of trial was the pastor of St. John the Baptist Parish. He worked at the Old Cathedral with his brothers throughout the time Graham was assigned there. He regarded him as an "outstanding priest" and was often with him alone. Graham also on a couple of occasions took him horseback riding. Graham never made him feel uncomfortable and was never the subject of rumors. Graham was the inspiration behind his decision to enter the seminary. (Tr. 690-95),

Vincent Rice was employed by BJC Health Care. He also worked at the Old Cathedral in the late 1970s. He had occasion to talk or watch television with Graham in his room at the Old Cathedral. As with the other defense witnesses, Graham never made him feel uncomfortable and he never heard of him making anyone else uncomfortable. Graham even taught him to drive on the parking lot of the Old Cathedral. Graham helped

him through a difficult time when his father died in 1977. He was impressed with the compassion Graham showed the homeless people who would knock on the door at the Old Cathedral. (Tr. 696-702).

Sergeant Patrick Rice was called to the stand again. He described his interaction with Graham at the Old Cathedral. He never was uncomfortable with Father Graham, and never heard of anyone else being uncomfortable. Graham helped him through some difficult personal times. (Tr. 703-07).

John Lang has been friends with Graham since they attended high school together. He described Graham as a priest and a friend. (Tr. 708-11). William Finnegan was an investigator with the Missouri State Board of Registration for the Healing Arts. Prior to that he was a Missouri State Highway Patrol officer for 28 years and a St. Louis Police Officer for six or seven years. Every Tuesday evening in recent years he and Graham have dinner and see a movie together. Finnegan, who attended a seminary for a short time, described Graham as "everything I would hope to have been had I become a priest." (Tr. 714).

None of the witnesses called by the defense believed Graham posed a danger to society and would readily allow Graham to spend unsupervised time with children, including their own.

POINTS RELIED ON

I. THE TRIAL COURT ERRED BY PROCEEDING TO TRIAL AND BY DENYING A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE THE PROSECUTION OF APPELLANT GRAHAM UNDER §563.230 RSMo 1969, WHICH CARRIES A PENALTY OF IMPRISONMENT FOR NOT LESS THAN TWO YEARS, WAS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS OF §541.200 RSMo 1969 IN THAT THE ACT OF SODOMY WAS ALLEGED TO HAVE OCCURRED ALMOST 25 YEARS BEFORE THE INDICTMENT AND ONLY STATUTES THAT IMPOSED ALTERNATIVE PUNISHMENTS OF DEATH OR IMPRISONMENT UP TO LIFE WERE SUBJECT TO NO LIMITATION PERIOD UNDER §541.190. THE CONTRARY HOLDING IN STATE v. GRAHAM, 149 S.W.3d 465 (MO.APP.E.D. 2004), IS ERRONEOUS BECAUSE IT ADOPTS A LESS PLAUSIBLE INTERPRETATION OF §541.190 THAT IS INCONSISTENT WITH (1) THE STATUTORY SCHEME EMBODIED IN THE 1969 CRIMINAL LAWS, (2) THE GENERAL ASSEMBLY'S INTERPRETATION OF §541.190, (3) OPINIONS OF THIS COURT INTERPRETING THAT STATUTE AND SIMILAR LANGUAGE IN OTHER STATUTES, AND (4) THE RULE OF LENITY, RESULTING IN MANIFEST INJUSTICE TO GRAHAM WHO WAS SENTENCED TO 20-YEARS IMPRISONMENT AS A RESULT OF A PROSECUTION THAT WAS TIME-BARRED.

State v. Weiler, 338 S.W.2d 878 (Mo. 1960)

State v. Naylor, 40 S.W.2d 1079 (Mo. 1931)

State v. Crawford, 478 S.W.2d 314 (Mo. 1972)

Garrett v. State, 481 S.W.2d 225 (Mo. banc 1972)

§541.200 RSMo 1969 (repealed)

§541.190 RSMo 1969 (repealed)

§563.230 RSMo 1969 (repealed)

§556.036 V.A.M.S. 1999 (Comment to the 1973 Proposed Code)

II. THE TRIAL COURT ERRED IN DENYING APPELLANT GRAHAM'S MOTION TO DISMISS THE INDICTMENT AND OVERRULING HIS MOTION FOR A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE THE REPEALED MISSOURI SODOMY STATUTE, §563.230 RSMO 1969, IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT IT CRIMINALIZES AN ACT OF SODOMY REGARDLESS OF CONSENT OR AGE AND THEREFORE IS FATALLY OVERBROAD, AND CANNOT BE JUDICIALLY REVISED TO BE CONSTITUTIONALLY APPLIED TO GRAHAM

Lawrence v. Texas, 539 U.S. 558 (2003)

Missouri Public Service Co. v. Platte-Clay Electric Coop., Inc. 407 S.W.2d 883 (Mo. 1966)

State v. Beine, 162 S.W.3d 483 (Mo. banc 2005)

Reno v. ACLU, 521 U.S. 844 (1997)

U.S. CONST. amend. XIV

Mo. Const., Article I, §10

§563.230 RSMo 1969 (repealed)

III. THE TRIAL COURT ERRED IN DENYING APPELLANT GRAHAM'S MOTION TO DISMISS THE INDICTMENT AND MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE §563.230 RSMO 1969 IS UNCONSTITUTIONALLY VAGUE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT AN INDIVIDUAL CANNOT BE CONSTITUTIONALLY PROSECUTED FOR AN ACT OF SODOMY ALONE UNDER *LAWRENCE v. TEXAS* AND THE STATUTE CONTAINS NO OTHER STANDARDS TO GIVE REASONABLE NOTICE OF THE CONDUCT THAT IS LAWFULLY PROSCRIBED OR TO PROVIDE LAW ENFORCEMENT WITH THE GUIDANCE NECESSARY TO AVOID ARBITRARY AND DISCRIMINATORY APPLICATION OF THE STATUTE SUCH AS OCCURRED IN THIS CASE

State v. Young, 695 S.W.2d 882 (Mo. banc 1985)

Lawrence v. Texas, 539 U.S. 558 (2003)

United States v. Raines, 362 U.S. 17 (1960)

State v. Reproductive Health Services,
97 S.W.3d 54 (Mo.App.E.D. 2002)

U.S. CONST. amend. XIV

Mo. Const., Article I, §10

§563.230 RSMo 1969 (repealed)

IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT WOOLFOLK DID NOT CONSENT TO THE ACT, EITHER BECAUSE HE WAS DEEMED INCAPABLE OF CONSENT DUE TO HIS AGE OR BECAUSE THE ACT WAS FORCIBLE, AND ERRED IN DENYING GRAHAM A NEW TRIAL IN THAT THE FAILURE TO INSTRUCT THE JURY THAT IT MUST FIND THESE ESSENTIAL ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT VIOLATED APPELLANT GRAHAM'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 18(a) AND 22(a) OF THE MISSOURI CONSTITUTION AND RENDERED §563.230 UNCONSTITUTIONAL AS APPLIED TO HIM UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

Jackson v. Virginia, 443 U.S. 307 (1979)

State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003)

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997)

State v. Strughold, 973 S.W.2d 876 (Mo.App.E.D. 1998)

U.S. CONST. amend. VI and amend. XIV

Mo. Const., Article I, §§ 10, 18 and 22

§563.230 RSMo 1969 (repealed)

MAI 12.50 (superseded)

V. THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE STATE'S EXHIBIT 7, AND ALLOWING THAT EXHIBIT TO GO TO THE JURY DURING DELIBERATIONS, AND BY DENYING APPELLANT GRAHAM'S MOTION FOR A NEW TRIAL, BECAUSE THAT EXHIBIT, A FIVE-PAGE LETTER BY WOOLFOLK, WAS TESTIMONIAL IN NATURE, INADMISSIBLE HEARSAY, INCLUDED EVIDENCE OF UNCHARGED CRIMES, AND IMPROPERLY BOLSTERED WOOLFOLK'S TESTIMONY AND DENIGRATED GRAHAM'S CREDIBILITY, THEREBY PREJUDICING GRAHAM IN THAT ITS ADMISSION AND PROVISION TO THE JURY DURING DELIBERATIONS DEPRIVED HIM OF A FAIR TRIAL, AS WELL AS HIS CONFRONTATION RIGHTS AND RIGHT TO BE TRIED ONLY FOR THE OFFENSE CHARGED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 17 AND 18(a) OF THE MISSOURI CONSTITUTION.

Walsh v. Terminal R. Ass'n, 182 S.W.2d 607 (Mo. banc 1944)

State v. Amende, 92 S.W.2d 106 (Mo. 1936)

State v. Churchill, 98 S.W.3d 536 (Mo. banc 2003)

State v. Evans, 639 S.W.2d 792 (Mo. banc 1982)

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT GRAHAM'S MOTION FOR A NEW TRIAL BECAUSE THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT RESULTED IN PREJUDICIAL ERROR WHICH AFFECTED THE SUBSTANTIAL RIGHTS OF GRAHAM AND DEPRIVED HIM OF A FAIR TRIAL IN THAT THE PROSECUTOR MADE STATEMENTS SUGGESTING WOOLFOLK WAS TARGETED FOR THE OFFENSE BECAUSE OF HIS RACE, THAT THE PRAYER FOR DAMAGES IN WOOLFOLK'S CIVIL LAWSUITS REFLECTED THE AMOUNT HE SOUGHT TO RECOVER, AND THAT ANY CIVIL JUDGMENT WOULD HAVE BEEN PAID BY THE ARCHDIOCESE RATHER THAN GRAHAM, WHICH STATEMENTS WERE (1) NOT SUPPORTED BY FACTS IN EVIDENCE; (2) CALCULATED TO INCITE AND APPEAL TO RACIAL PREJUDICE; AND (3) MISSTATEMENTS OF THE FACTS AND LAW IN THAT THERE WAS NO EVIDENCE WOOLFOLK WAS "TARGETED" BECAUSE OF HIS RACE, THE PRAYER IN THE CIVIL LAWSUITS WAS FOR JURISDICTIONAL PURPOSES ONLY, AND GRAHAM WAS AN INDIVIDUAL DEFENDANT IN THE CIVIL LAWSUITS AND THEREFORE SUBJECT TO AN AWARD OF MONEY DAMAGES

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995)

State v. Stamps, 569 S.W.2d 762 (Mo.App.E.D. 1978)

State v. Long, 684 S.W.2d 361 (Mo.App.E.D. 1984)

Bradley v. Waste Management of Missouri, Inc.
810 S.W.2d 525 (Mo.App.E.D. 1991)

VII. THE TRIAL COURT ERRED IN ALLOWING MICHELLE TELLE-CAPSTICK AND JOHN ROHAN TO TESTIFY, OVER APPELLANT GRAHAM'S OBJECTION, DURING THE PENALTY PHASE OF THE TRIAL IN THAT THE IDENTITY OF THESE WITNESSES WAS NOT TIMELY DISCLOSED AND THE STATE FAILED TO PROVIDE DISCOVERY REGARDING THESE WITNESSES PURSUANT TO MISSOURI SUPREME COURT RULE 25.03 WHICH DENIED GRAHAM A MEANINGFUL OPPORTUNITY TO WAIVE JURY SENTENCING OR TO CHALLENGE TESTIMONY THAT WAS INHERENTLY UNRELIABLE AND HIGHLY PREJUDICIAL.

Zurheide-Hermann, Inc. v. London Square Dev. Corp., 504 S.W.2d 161 (Mo. 1973)

State v. Thompson, 985 S.W.2d 779 (Mo. banc 1999)

State v. Taylor, 944 S.W.2d 925 (Mo. banc 1997)

State v. Greer, 62 S.W.3d 501 (Mo.App.E.D. 2001)

§557.036 RSMo

Missouri Supreme Court Rule 25.03

VIII. THE TRIAL COURT ERRED IN INVITING THE PROSECUTOR TO MAKE A REBUTTAL ARGUMENT DURING THE PENALTY PHASE OF THE TRIAL AFTER THE PROSECUTOR HAD WAIVED REBUTTAL, AND IN DENYING APPELLANT GRAHAM'S MOTION FOR A NEW TRIAL, BECAUSE GRAHAM WAS DENIED FAIR NOTICE OF THE STATE'S POSITION ON PUNISHMENT IN THAT DEFENSE COUNSEL HAD NO NOTICE THAT THE STATE COULD RESPOND TO HIS RECOMMENDATION OF A TWO-YEAR SENTENCE BY ARGUING IN REBUTTAL FOR A 25-YEAR SENTENCE AND THEREBY DEPRIVE GRAHAM OF ANY OPPORTUNITY TO RESPOND, WHICH RESULTED IN MANIFEST INJUSTICE TO GRAHAM WHO WAS SENTENCED TO THE 20-YEARS OF IMPRISONMENT RECOMMENDED BY THE JURY AFTER THE STATE'S ARGUMENT

State v. Peterson, 423 S.W.2d 825 (Mo. 1968)

State v. Maxie, 513 S.W.2d 338 (Mo. 1974)

State v. Davis, 566 S.W.2d 437 (Mo. banc 1978)

ARGUMENT

I.

THE TRIAL COURT ERRED BY PROCEEDING TO TRIAL AND BY DENYING A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE THE PROSECUTION OF APPELLANT GRAHAM UNDER §563.230 RSMo 1969, WHICH CARRIES A PENALTY OF IMPRISONMENT FOR NOT LESS THAN TWO YEARS, WAS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS OF §541.200 RSMo 1969 IN THAT THE ACT OF SODOMY WAS ALLEGED TO HAVE OCCURRED ALMOST 25 YEARS BEFORE THE INDICTMENT AND ONLY STATUTES THAT IMPOSED ALTERNATIVE PUNISHMENTS OF DEATH OR IMPRISONMENT UP TO LIFE WERE SUBJECT TO NO LIMITATION PERIOD UNDER §541.190. THE CONTRARY HOLDING IN STATE v. GRAHAM, 149 S.W.3d 465 (MO.APP.E.D. 2004), IS ERRONEOUS BECAUSE IT ADOPTS A LESS PLAUSIBLE INTERPRETATION OF §541.190 THAT IS INCONSISTENT WITH (1) THE STATUTORY SCHEME EMBODIED IN THE 1969 CRIMINAL LAWS, (2) THE GENERAL ASSEMBLY'S INTERPRETATION OF §541.190, (3) OPINIONS OF THIS COURT INTERPRETING THAT STATUTE AND SIMILAR LANGUAGE IN OTHER STATUTES, AND (4) THE RULE OF LENITY, RESULTING IN MANIFEST INJUSTICE TO GRAHAM WHO WAS SENTENCED TO 20-YEARS IMPRISONMENT AS A RESULT OF A PROSECUTION THAT WAS TIME-BARRED

The trial court initially dismissed the indictment as barred by the three-year statute of limitations in §541.200 RSMo 1969 (repealed). The Missouri Court of Appeals for the Eastern District of Missouri reversed that decision, holding that there is no statute of limitations for the prosecution of acts of sodomy that occurred before January 1, 1979 and remanded the case for trial. Its decision resulted in the conviction of a 71-year-old priest based essentially on the uncorroborated testimony of one witness who provided a cryptic description of one act of sodomy and virtually no detail about when the event occurred. Due to the passage of time, any third party who might have had information about the interaction in the late 1970's between Graham and his accuser, Woolfolk, was dead or suffering from dementia. Ultimately, the jury recommended, and the trial court imposed, a twenty-year sentence, effectively a life sentence for a man of Graham's age.

The decision of the court of appeals is wrong. It reached its result by a statutory interpretation that is belied by logic, the structure of the criminal code, contemporaneous interpretations of the statute of limitations by the General Assembly, and opinions of this Court construing both the statutes involved and essentially the same operative language in other statutes. Since the appropriate statute of limitations is a question of law, the standard of review is de novo.[4] *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006).

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[4] Even though this matter was previously before the court of appeals, upon a second appeal, if this Court determines that there was an error in the first appeal, "it not only has the power and right to correct such error, but it would be the duty of the court so to do, in the interest of justice." *Poe v. Illinois Cent. R. Co.*, 99 S.W.2d 82, 83 (Mo. 1936). This duty exists whether there is an error in the principles of law declared or in the determination of what were the facts of the case. *Id.*

A.

The Statutes of Limitations and the Reasoning of the Court of Appeals

The criminal provisions of the 1969 Revised Missouri Statutes, most of which were repealed in 1978, contained two separate sections addressing time limitations in criminal cases: §541.190 and §541.200. Those statutes stated:

> **541.190. No limitation in capital cases. ---**
> Any person may be prosecuted, tried and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense shall have been committed.
>
> **541.200. Three and five year limitations, when. --** No person shall be tried, prosecuted or punished for any felony, other than as specified in section 541.190, unless an indictment be found or information be filed for such offense within three years after the commission of such offense, except indictment or informations for bribery or for corruption in office may be prosecuted if found or filed within five years after the commission of the offense.

A prosecution initiated in 2002 for conduct that purportedly occurred in the late 1970's undoubtedly violates the three-year limitation of §541.200. Thus, Graham's prosecution could only proceed if it were deemed to fall within the scope of §541.190, entitled "No limitation in capital cases." Section 541.190 allows a prosecution to be

brought "at any time after the offense" for any crime "punishable with death or by imprisonment in the penitentiary during life."[5]

Graham was charged with sodomy in violation of §563.230 RSMo 1969, which was then punishable by a term of imprisonment of "not less than two years." While the sodomy statute provided no maximum punishment, thereby creating the conceivable possibility of a sentence of life imprisonment, §546.490 RSMo 1969, the offense was usually punished by a lesser term of years. Graham argued in the trial court that §541.190 did not apply to the charge against him because sodomy under §563.230, although theoretically punishable by life imprisonment, was not an offense punishable by the alternative of death or imprisonment for life.[6]

After the trial court dismissed the indictment as barred by the statute of limitations, the sole issue before the court of appeals was whether a charge of sodomy under §563.230, which provided for an open-ended punishment, was an offense "punishable with death or imprisonment during life" within the meaning of §541.190.

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[5]Even though a new criminal code went into effect in 1979, the criminal limitations periods set out in the 1969 statutes govern this prosecution as a result of the savings statute contained in the 1979 Code. The savings statute provides that the 1979 Code does not apply to or govern the construction or punishment of any offense committed prior to January 1, 1979. §556.031 RSMo 1978.

[6]Offenses for which the specified punishment is a minimum term with no limit as to the duration are often referred to as "open-ended" offenses or offenses with "open-ended" punishment.

Graham argued that §541.190 only applied to capital offenses, which authorized alternative punishments of death or life imprisonment.

The court of appeals disagreed. It held that the "plain and ordinary" language of §541.190 was neither vague nor ambiguous. It therefore declined to apply any rules of statutory construction and dismissed prior precedent of this Court as irrelevant. *State v. Graham*, 149 S.W.2d 465, 468-69 (Mo.App.E.D. 2004). The court of appeals concluded that the phrase "punishable with death or by imprisonment in the penitentiary during life," required that §541.190 be applied *either* to any offense that had a potential punishment of death *or* to any offense for which a potential punishment of life imprisonment was authorized. *Graham*, 149 S.W.2d at 468-69. The court reasoned that because §563.230 could be construed to authorize a punishment of up to life imprisonment, it fell within §541.190, and consequently, there was no limitations bar to prosecuting Graham for acts that allegedly occurred more than twenty-five years earlier. Accordingly, the appellate court reversed and remanded the case for trial.

B.

The Court of Appeals' Textual Analysis Does Not Reflect the Most Plausible Interpretation of §§541.190 and 541.200.

The court of appeals viewed §541.190 in a vacuum. Using an overly simplistic approach, it focused solely on the word "or" as used in the phrase "punishable with death or by imprisonment in the penitentiary during life." Stating that "or" is commonly used in the disjunctive, the court concluded that if either condition were met, *i.e.*, *either* the

offense was punishable by death *or* the offense authorized a punishment of life imprisonment, §541.190 applied and prosecution of the offense was not subject to a limitations period. However, the court of appeals ignored a textual interpretation that is more plausible than the one it adopted and certainly more consonant with the statutory scheme embodied in the Missouri criminal provisions that were subject to §541.190 and §541.200. That interpretation is that when §541.190 refers to a crime "punishable with death or by imprisonment in the penitentiary during life," it means precisely that: a crime that specifies as maximum punishments the alternatives of death or imprisonment up to life.

Sections §541.190 and 541.200 must be considered in light of the entire statutory scheme. *E.g.*, *State v. Withrow*, 8 S.W.3d 75, 79-80 (Mo. banc 1999) (court must consider the particular statute together with related statutes which shed light on its meaning); *Citizens Elec. Corp. v. Director of Dept. of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989) (same); *see also State v. Rousseau*, 34 S.W.3d 254, 260 (Mo.App.W.D. 2000) (rejecting State's attempt to interpret statute in isolation without regard to statutory scheme). Upon examination of the 1969 Revised Statutes of Missouri, it is apparent that the most serious offenses were punishable by the alternative of death or a term of imprisonment of up to life imprisonment. *See* §559.030 (first degree murder); §559.230 (kidnapping for ransom); §559.260 (rape); §560.135 (robbery with dangerous weapon); §562.010 (treason); §557.020 (perjury committed during trial of capital offense).[7] For example, the punishment for rape under the 1969 criminal laws was death or

imprisonment in the penitentiary for not less than two years. §559.260 RSMo 1969. The purpose of section 541.190 was undoubtedly to specify those offenses that the General Assembly regarded as so villainous as to permit a prosecution at any time, regardless of when the offense occurred. It is more plausible that the phrase "punishable with death or by imprisonment in the penitentiary during life," as used in §541.190, contemplated those offenses that, as the most grave crimes, carried an alternative of death, rather than referring to the assortment of lesser offenses that happened to carry an open-ended punishment.[8]

C.

At a Minimum, §541.190 contains a Patent Ambiguity Requiring Application of Rules of Statutory Construction.

Even if this Court concludes that a textual analysis is not sufficient to conclude definitively that §541.190 was intended to reference only those offenses carrying an alternative maximum punishment of death or life imprisonment, the foregoing discussion makes clear that at a minimum, §541.190 contains a patent ambiguity requiring further

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[7]All of these citations are to the 1969 Revised Statutes of Missouri.

[8]Indeed, other 1969 offenses carrying open-ended punishments included "forcing a woman to marry," §559.280 RSMo 1969. Surely the Missouri General Assembly did not intend for this offense to be within the class of most serious offenses for which there is an unlimited statute of limitations. Other open-ended offenses were loaning of public money by a state or local official (§558.220) and the receipt of benefits from deposits by such officials (§§558.230, 558.240).

statutory analysis. While the court of appeals simply declared the statute unambiguous and dismissed as irrelevant precedents construing similar language, this Court has acknowledged the ambiguity of substantially the same language in closely related contexts. *See, e.g., State v. Naylor*, 40 S.W.2d 1079, 1083-84 (Mo. 1931) (concluding there were at least two plausible constructions of phrase "punishable by death or by imprisonment in the penitentiary for life" in statute governing peremptory challenges); *Garrett v. State*, 481 S.W.2d 225, 227 (Mo. banc 1972) (Finch, J. concurring) (outlining three possible constructions of the phrase "punishable by a sentence of death or life imprisonment" as used in Court's constitutional grant of jurisdiction).

Where a statute can be read differently by reasonably well-informed persons, the statute is ambiguous. *E.g., State v. Rowe*, 63 S.W.3d 647 (Mo. banc 2002) (ambiguity exists when there is more than one possible interpretation); *State v. Haskins*, 950 S.W.2d 613, 615-16 (Mo.App.S.D. 1997) *citing* 2A Sutherland, *Statutory Construction*, §45.02 at 6 (5th ed. 1992). If §541.190 is susceptible to more than one possible meaning, this Court must resort to rules and canons of construction to ascertain what offenses were within the class of crimes for which the legislature intended no limitations bar.

"The primary rule of statutory construction is to give effect to legislative intent . . . ." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). Because statutory construction is a question of law, rather than discretion, no deference is due to a lower court's construction of the statute. *Control Technology and Solutions v. Malden R-1 School Dist.*, 181 S.W.3d 80 (Mo.App.E.D. 2005). In construing §§541.190 and 541.200, this Court has the benefit of (1) interpretations by the Missouri General Assembly of

these very statutes about the time that the offense was alleged to have occurred; (2) prior precedent of this Court interpreting these statutes; and (3) prior opinions of the Court interpreting substantially similar language in a related criminal statute. All of these sources are significant parts of this Court's inquiry and all lead ineluctably to the conclusion that §541.190 was intended to apply only to those most egregious offenses that authorized the alternative maximum punishments of death or life imprisonment.

1.

The General Assembly's Understanding of §§541.190 and 541.200 RSMo 1969 as Set Forth in Commentary to the 1979 Criminal Code Makes Clear that Section §541.190 Applied Only to Capital Offenses

To determine the meaning of a statute, it is proper for courts to consider the policy of the legislature as disclosed by a general course of legislation including acts passed at prior, contemporaneous and subsequent legislative sessions. *State ex rel. Jackson County v. Spradling*, 522 S.W.2d 788, 791 (Mo. banc 1975). Persuasive evidence of how §541.190 RSMo 1969 was read and understood prior to its repeal can be gleaned from the legislative history of the criminal limitations statutes that superseded §541.190. *E.g.*, *State ex rel. Nixon v. McClure*, 969 S.W.2d 801, 807 n. 13 (Mo.App.W.D. 1998) (legislative history of statutory amendments to an act are appropriately considered in ascertaining legislative policy and intent of original legislation).

That evidence is set forth in the commentary to the comprehensive criminal code that was enacted in 1977, and effective on January 1, 1979. *See* §556.011 RSMo 1978.[9] The provisions of the 1979 Code setting out criminal limitations periods are set forth in §556.036 RSMo 1978. The commentary to that section makes clear that, with minor exceptions, the 1979 Code was intended to maintain the same criminal limitations periods as existed under pre-Code law. The General Assembly is presumed to have been aware of the pre-Code state of the law on criminal limitations at the time it enacted the 1979 Criminal Code. *See Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988). The relevant commentary on §556.036 states in pertinent part:

> With some minor changes this section maintains the same periods of limitation [] formerly covered by §§541.190 through 541.230 RSMo. §541.190 provided for no limitation in the prosecution of an "offense punishable with death or by imprisonment in the penitentiary during life." Subsection 1 of the Code provision achieves the same result but in terms of "murder or Class A Felony." Former §541.200 provided for a three year period for all other felonies with a possible two year extension for "bribery or for corruption in office." . . .

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[9]This Court has frequently looked to the Commentary to the Criminal Code when interpreting statutes that are part of that Code. *E.g.*, *State v. Cornman*, 695 S.W.2d 443, 448 (Mo. banc 1985); *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. banc 1983). The Commentary was originally prepared by the Missouri Committee to Draft a Model Criminal Code. However, a "court is entitled to assume the General Assembly was aware of and intended to adopt that interpretative comment when it enacted the Code provisions." *State v. Eby*, 629 S.W.2d 515, 519 (Mo. App. S.D. 1981).

See §556.036 V.A.M.S. 1999 (Comment to the 1973 Proposed Code).

Under §556.036 of the 1979 Code, there is no limitations period for the offense of murder or for any Class A felony offense. According to the commentary, this provision of the 1979 Code is intended to achieve the same result as §541.190, which provided for no limitation in the prosecution of an "offense punishable with death or by imprisonment in the penitentiary during life." Thus, the commentary makes clear that those offenses designated as Class A felony offenses under the 1979 Code were understood to be the same offenses that had no limitations periods under §541.190 of the 1969 Revised Missouri Statutes.

Under the 1979 Code, the Class A felony offenses include kidnapping for ransom (§565.110 RSMo 1978), rape with deadly weapon (§566.030 RSMo 1978), robbery in the first degree (§569.020 RSMo 1978), perjury in a criminal trial for purpose of securing a murder conviction (§575.040 RSMo 1978) and treason (§576.070 RSMo 1978). Significantly, each of these Class A felony offenses under the 1979 Code was an offense punishable by the alternative of death or a term of years up to life imprisonment under the 1969 criminal laws.[10] This demonstrates that in 1977, when the Missouri General Assembly enacted the new Criminal Code, it understood that §541.190 only applied to

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[10] *See* §559.230 RSMo 1969 (kidnapping for ransom); §559.260 RSMo 1969 (rape); §560.135 RSMo 1969 (first degree robbery); §557.020(1) RSMo 1969 (perjury at trial of capital offense); §562.010 RSMo 1969 (treason).

these capital offenses. Interestingly, this legislative interpretation of §541.190 occurred in the same general timeframe when the instant offense is alleged to have occurred.

It is also instructive to examine the offenses that carry a three-year statute of limitations under the 1979 Code. If, as the commentary suggests, the 1979 Code was intended to maintain existing law, those offenses that are subject to a three-year statute of limitations under the 1979 Code should logically have fallen within §541.200, the three-year statute of limitations prior to 1979. Under the 1979 Code, statutory or forcible sodomy is a class B felony unless the actor inflicts serious physical injury or displays a deadly weapon. §566.060 RSMo 1978. The 1979 Code provides a three-year statute of limitations for class B felony offenses. §556.036.2(1) RSMo 1978. The only reasonable conclusions are: (1) that the legislature understood that there was also a three-year limitations period for a sodomy prosecution under pre-Code law; and (2) that under the 1969 criminal laws, an open-ended offense like sodomy was not an offense "punishable with death or by imprisonment in the penitentiary during life" within the meaning of §541.190.

An analysis of the other pre-Code offenses that carried open-ended punishments supports these conclusions. Under the 1969 criminal statutes, the following offenses provided for open-ended punishment: assault with intent to kill (§559.180 RSMo 1969), rape by drugging (§559.270 RSMo 1969), arson (§560.010 RSMo 1969), robbery without a deadly weapon (§560.135 RSMo 1969), sodomy (§563.230 RSMo 1969), rescuing a prisoner (§557.230 RSMo 1969), and certain official misconduct offenses (§§558.220,

558.240 RSMo 1969). All of these offenses became Class B felonies under the 1979 Code subject to a three-year statute of limitations. §556.036.2(1).[11]

That the General Assembly intended for §541.190 to exclude open-ended offenses and include only offenses for which the 1969 statutes authorized an alternative punishment of death or up to life imprisonment is also evident from the title of that section which states "**No limitation in capital cases.**" A capital offense has long been understood to refer to those offenses for which death is a possible punishment. *See, e.g.*, *In re Schultz*, 257 S.W. 447, 448 (Mo. banc 1924) ("a capital offense, i.e., punishable by death"). A "capital offense" encompasses not only those offenses punishable by death alone, but also those offenses that include an authorized alternative penalty of up to life imprisonment. *E.g.*, *Ex parte Heath*, 126 S.W. 1031, 1033 (Mo. 1910) (indictment for offense punishable by alternative of death or imprisonment during life is a capital offense). While the title of a statute is not conclusive as to its intended scope, "headings and revisor's catchlines may be pertinent in demonstrating how the statute has generally been read and understood." *Fiandaca v. Niehaus*, 570 S.W.2d 714, 717 n.2 (Mo.App.E.D. 1978); *Holland v. Duckworth*, 539 S.W.2d 326, 329 (Mo.App.W.D. 1976).

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[11]*See* §566.030 RSMo 1978 (rape by drugging); §569.040 RSMo 1978 (arson); §569.030 RSMo 1978 (robbery without deadly weapon); §566.060 RSMo 1978 (sodomy); §575.230 RSMo 1978 (aiding escape of prisoner); §565.050 RSMo 1978 (assault with intent to kill). The official misconduct offenses were subsumed under the new offense of acceding to corruption, which is a Class D felony. §576.020 RSMo 1978.

2.

The Opinion of the Court of Appeals Conflicts With Previous Opinions Of This Court Interpreting §§541.190 and 541.200 RSMo 1969

The court of appeals' conclusion in *Graham* that §541.190 encompasses every 1969 offense that carries an open-ended penalty is also belied by prior opinions of this Court. *State v. Weiler*, 338 S.W.2d 878 (Mo. 1960), is the Court's clearest construction of the criminal limitations statutes prior to enactment of the 1979 Code.[12] In *Weiler*, this Court expressly acknowledged that §541.190 was limited to capital offenses. At issue in *Weiler* was whether the indictment in a fraud case was timely. The Court concluded that it was not timely, because it had been returned almost six years after the alleged offense. It described the charged offense as a "noncapital felony and thus within the compass of the 3-year limitation provision appearing in Section 541.200 . . . ." *Id*. at 880. In quoting the pertinent language of §541.200, the Court added bracketed language emphasizing its understanding that §541.190 is limited to capital offenses:

> No person shall be tried, prosecuted or punished for any felony, other than as specified in section 541.190 [capital offenses], unless an indictment be found or information be filed for such offense within three years after the commission of such offense . . .(Bracketed insert ours.)

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[12]In *Weiler*, this Court construed §541.200 from the 1949 statutory compilation. Section 541.200 is the same in both the 1949 and 1969 compilations.

Id. at 880 (bracketed language and parenthetical in original). By inserting the bracketed language into its quotation and expressly stating that a "noncapital felony . . . [is] within the compass of the 3-year limitation provision," this Court unequivocally recognized that under §541.190, capital offenses are the only offenses for which there is no limitations bar.

After *Weiler* was decided, only two other opinions of this Court have touched on the meaning of §§541.190 and 541.200 prior to the repeal of those statutes in 1979: *State v. Cook*, 463 S.W.2d 863 (Mo. 1971), and *State v. Bascue*, 485 S.W.2d 35 (Mo. 1972). Both of those opinions are consistent with the Court's conclusion in *Weiler* that the three-year statute of limitations in §541.200 applied to all non-capital felony offenses, including offenses with open-ended punishments. In *State v. Cook*, 463 S.W.2d 863 (Mo. 1971), the defendant was charged with assault with intent to do great bodily harm under §559.180 RSMo 1969. That offense was punishable by "imprisonment in the penitentiary not less than two years," the same punishment specified for the sodomy offense at issue in this case. The *Cook* Court concluded that the three-year statute of limitations of §541.200 was applicable rather than the no limitations period of §541.190. Although the Court did not provide any analysis, the result is consistent with the Court's

opinion in *Weiler* that the three-year limitations period applies to non-capital offenses.[13]

Also consistent with *Weiler* is the Court's opinion in *State v. Bascue*, 485 S.W.2d 35 (Mo. 1972). In *Bascue*, the defendant was charged with statutory rape in violation of §559.260 RSMo 1969. Under the 1969 criminal laws, rape was a capital offense punishable by death or imprisonment for not less than two years. On appeal, the defendant raised an issue regarding the admission of prior acts of misconduct. The defendant argued that this evidence was inadmissible because the acts at issue were outside the three-year statute of limitations in §541.200. The Court rejected the defendant's argument on the ground that the statute of limitations is irrelevant to evidentiary issues. However, the Court went on to note, in *dicta*, that even if the issue of limitations were relevant, the charge of statutory rape carried no limitations period under

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[13]In the court of appeals the State relied on *State v. Bray*, 246 S.W. 921 (Mo. 1922) for the proposition that there is no limitations period for open-ended offenses. In *Bray*, this Court commented in *dicta* that there is no limitations period for robbery in the first degree because it carried an open-ended punishment. However, the *Bray* court was not called upon to interpret the limitations statutes. Its gratuitous comment related to the defendant's complaints about a jury instruction. Moreover, *Bray* was decided 38 years *before* this Court's opinion in *Weiler*. The State's reliance on *State v. Swain*, 144 S.W. 427 (Mo. 1912), or *State v. Palmer*, 306 S.W.2d 441 (Mo. 1957), is equally unavailing. Both cases involved a charge of statutory rape punishable by the alternative of death or not less than a term in the penitentiary. *See* §4471 RSMo 1909 and §559.260 RSMo 1949.

§541.190. Accordingly, *Bascue* is consistent with *Weiler* because statutory rape was then a capital offense, which under §541.190, had no limitations period.

3.

Previous Opinions Of This Court Have Concluded that Virtually Identical Language, Does Not Encompass Offenses Carrying Open-Ended Punishments

In *State v. Naylor*, 40 S.W.2d 1079 (Mo. 1931), this Court interpreted language in the statute governing peremptory challenges that is virtually identical to the language in §541.190. The statute stated in pertinent part:

> In all criminal cases the state and the defendant shall be entitled to a peremptory challenge of jurors as follows: First, if the offense charged is *punishable by death or by imprisonment in the penitentiary for life*, the state shall have the right to challenge six and the defendant twelve, and no more; second, in all other cases punishable by imprisonment in the penitentiary the state shall have the right to challenge four and the defendant eight and no more . . .

Id. at 1083 (emphasis added) *quoting* §3674 RSMo 1929.

In *Naylor*, the defendant was charged with second degree murder, which carried a potential punishment of not less than ten years of imprisonment. 40 S.W.2d at 1083. The defendant argued that because the second degree murder statute provided for an open-ended punishment, he could potentially be sentenced to life imprisonment. Consequently, he claimed that the offense was one that was "punishable by death or

imprisonment in the penitentiary for life" and that he was entitled to twelve peremptory challenges under the statute. The Court disagreed, holding that the "grave" cases falling within the scope of the phrase "punishable by death or imprisonment in the penitentiary for life" did not include offenses that carried open-ended punishments that theoretically could include life imprisonment. The Court stated that the policy in Missouri criminal procedure had always been to allow more challenges in "those grave cases falling within the first subdivision of old section 4017 than in cases in which the punishment, at the discretion of the jury, may be a term equivalent to life imprisonment or may be (and usually is) a shorter term in the penitentiary." *Id*. at 1084.

In its *Graham* opinion, the court of appeals stated that this Court's reasoning in *Naylor* was not applicable to the virtually identical language of §541.190. It noted that the *Naylor* Court had based its construction of the statute upon the legislative intent, and therefore its analysis was "limited to the statutes regarding peremptory challenges in criminal cases." The court of appeals concluded that because §541.190 was "neither vague nor ambiguous," it did not need to look to prior interpretations of this Court regarding substantially the same language.

Because the court of appeals erroneously concluded that it had divined the only plausible interpretation of §541.190, its resulting rejection of this Court's prior opinion in *Naylor* is also flawed. In *Naylor*, this Court clearly held that the open-ended offense of second degree murder was not a crime "punishable by death or imprisonment in the penitentiary during life." It is equally clear that this Court had the same opinion of the open-ended offense of sodomy. In *State v. Crawford*, 478 S.W.2d 314 (Mo. 1972), the

defendant was found guilty of sodomy under §563.230 RSMo 1969, the same statute at issue in this case. Much of the *Crawford* opinion relates to the defendant's challenge to the constitutionality of the statute – which in light of the United States Supreme Court's subsequent opinion in *Lawrence v. Texas*, has little bearing on any of the issues before this Court. *See* Section II *infra*. However, in *Crawford*, as in *Naylor* decided 40 years earlier, the defendant argued that the trial court erred in failing to afford him twelve peremptory challenges under §546.180 RSMo 1969. *Crawford*, 478 S.W.2d at 319. Like the version of the statute at issue in *Naylor*, §546.180.1(1) provided for twelve peremptory challenges if the charged offense were "punishable by death or by imprisonment in the penitentiary for life." The Court reaffirmed its holding in *Naylor* and concluded that the *Crawford* defendant was not entitled to twelve peremptory challenges. *Crawford*, 478 S.W.2d at 319. In so holding, this Court necessarily found that a charge brought under §563.230 is not an offense "punishable by death or by imprisonment in the penitentiary for life." *See also State v. Griggs*, 445 S.W.2d 633, 636 (Mo. 1969) (defendant not entitled to additional challenges where state waived the death penalty and defendant could thereafter only receive a sentence of from five years to life imprisonment).

If sodomy charged under §563.230 is not an offense "punishable by death or by imprisonment in the penitentiary for life" under the peremptory challenge provisions of §546.180 RSMo 1969, it is difficult to conceive how that very same charge could be an offense "punishable with death or by imprisonment in the penitentiary during life" under the limitations provisions set out in §541.190 RSMo 1969. In both statutes, the Missouri

General Assembly sought to carve out special provisions for those offenses that are the most "grave." "In construing a statute it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times." *Cook Tractor Co., Inc. v. Director of Revenue*, 2006 WL 920766 at *2 (Mo. banc 2006); *Weber v. Missouri State Hwy Comm'n*, 639 S.W.2d 825, 829 (Mo. 1982). This Court must avoid construing these statutes in a manner that is "unjust, absurd, [or] unreasonable." *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 832, 835 (Mo. banc 1953); *see also Schneider v. State*, 748 S.W.2d 677, 678 (Mo. banc 1988) (court presumes legislature did not intend to enact absurd law and favors a construction that avoids unjust and unreasonable results).

That §541.190 does not include offenses with open-ended punishments is further supported by this Court's opinion in *Garrett v. State*¸ 481 S.W.2d 225 (Mo. banc 1972). In *Garrett*, the Court was asked to interpret its own jurisdictional grant contained in the Missouri Constitution. As of 1972, this Court had exclusive jurisdiction over "all appeals involving offenses punishable by a sentence of death or life imprisonment." *Id.* at 226 *quoting* Article V, Sec. 3, Const. of Missouri (as amended 1970). In *Garrett*, the defendant was charged with robbery (not by means of a dangerous weapon), which carried an open-ended punishment of not less than five years. *Id*. at 226-27. The Court held that its exclusive jurisdiction did not encompass offenses such as robbery for which the specified punishment was open-ended and therefore could include life imprisonment.

4.

The Rule of Lenity Requires that This Court Apply the Three-Year Statute of Limitations in §541.200 to this Case.

Any ambiguity in the application of the limitations provisions of the 1969 criminal laws is subject to the rule of lenity. Under the rule of lenity any "ambiguity in a penal statute will be construed against the government or party seeking to exact statutory penalties and in favor of the persons on whom such penalties are sought to be imposed." *J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo. banc 2000). "[T]he statute of limitations should be liberally construed in favor of the accused." *State v. Colvin*, 223 S.W. 585, 586 (Mo. 1920).

Therefore, any ambiguity as to which of two statutes of limitations applies must be interpreted "in favor of repose." *Toussie v. United States*, 397 U.S. 112, 115 (1970). "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Id*. at 114. "Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id*. at 114-15.

The opinion of the court of appeals, which concluded that a prosecution for sodomy under §563.230 may be commenced at any time, denied Graham that protection. Woolfolk's testimony was devoid of any specificity regarding the date or circumstances

of the act charged in the indictment. Graham was forced to try to defend allegations about his conduct over at least a three-year period more than a quarter century ago. His accuser did not tell anyone about the allegation until sometime in 1993, and then waited another nine years before contacting the Circuit Attorney's Office. In the meantime, both witnesses and memory were lost to the passage of time. Time had not only stripped the allegation of specificity, but it also denied Graham any hope of being able to defend against the charge with proof of his whereabouts or with witnesses to his interaction with his accuser.

When compared to what happened in this case, the outrage of a 19th century jurist about a two-year delay in bringing a bestiality charge sounds quaint and naïve.

> It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at that time; but if the charge be not preferred for a year or more, how can he clear himself?

Regina v. Robins, 1 Cox's C.C. 114 (Somerset Winter Assizes 1844), *quoted in United States v. Marion*, 404 U.S. 307, 328-29 (1971) (Douglas, J., concurring in the result).

The absence of specificity and dearth of corroboration creates a vacuum too easily filled by prejudice, presumption and selective enforcement. It is telling that this Court is confronting this statute of limitations question 27 years after the sodomy statute was repealed. This strongly suggests that there have been no other prosecutions under this statute for more than 20 years. It also means that even prior to the repeal of §563.230, no

prosecutor apparently saw the need (or understood the law to permit) sodomy prosecutions more than three years after the offense. It is troubling that this statute was revived, and these conventional understandings abandoned, solely for the purpose of prosecuting Graham, who happens to be a Roman Catholic priest.

Reasonable limitations periods for criminal prosecution obviate the due process concerns raised by a prosecution like this one. When the rule of lenity is combined with the logic of the statutory scheme and the informed readings of §541.190 by the General Assembly and this Court, it is clear that the prosecution of Father Thomas Graham is barred by the three-year statute of limitations of §541.200 RSMo 1969, and therefore his conviction must be reversed and the indictment dismissed.

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT GRAHAM'S MOTION TO DISMISS THE INDICTMENT AND OVERRULING HIS MOTION FOR A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE THE REPEALED MISSOURI SODOMY STATUTE, §563.230 RSMO 1969, IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT IT CRIMINALIZES AN ACT OF SODOMY REGARDLESS OF CONSENT OR AGE AND THEREFORE IS FATALLY OVERBROAD, AND CANNOT BE JUDICIALLY REVISED TO BE CONSTITUTIONALLY APPLIED TO GRAHAM

If this Court concludes that the prosecution of Father Thomas Graham is not barred by the statute of limitations, it must address the constitutionality of the sodomy statute under which he was prosecuted, §563.230 RSMo 1969. That statute, which was repealed in 1979, stated as follows:

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.

Under this statute, the crime is simply the "detestable" act. The statute specifies no other elements of the offense, only that the act be committed and that it be a "crime against

nature." *See* §566.060 V.A.M.S. 1999 (Comment to 1973 Proposed Code) ("Under [§563.230], the 'detestable' act is the crime, and force, duress, or other lack of consent are immaterial.").

A.

Section 563.230 is Unconstitutional Under *Lawrence v. Texas*

The trial court erred in failing to dismiss the indictment or to grant a judgment of acquittal, on the grounds that §563.230 is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Due Process Clause of the Missouri Constitution, Article I, §10. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court considered the constitutionality of a Texas statute similar to §563.230. The Texas statute criminalized deviate sexual intercourse between individuals of the same sex. Like the definition of "crimes against nature" in §563.230, the Texas statute defined "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person." *Id*. at 563.

The U.S. Supreme Court held that the Texas statute violated the Due Process Clause of the United States Constitution because it infringed upon an individual's liberty to engage in private consensual sexual activity without intervention by the state. *Id*. at 578. In *Lawrence*, the Supreme Court also expressly overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Bowers* had upheld a statute that provided "[a] person commits the offense of sodomy when he performs or submits to any sexual

act involving the sex organs of one person and the mouth or anus of another …." *Id.* at 188 n. 1.

Section 563.230 indisputably sweeps within its scope the same conduct that the *Lawrence* Court concluded was within an individual's fundamental liberty rights under the Due Process Clause. With the benefit of the Supreme Court's guidance in *Lawrence v. Texas*, it is clear that §563.230, which proscribes sodomy under any and all circumstances, is unconstitutional and consequently states an invalid rule of law. This Court's review of constitutional challenges to a statute is *de novo*. *Rizzo v. State*, 2006 WL 1073051 *1 (Mo. banc April 25, 2006).

B.

Graham Has Standing to Challenge the Constitutionally of §563.230

The State below did not dispute the unconstitutionality of §563.230 in light of *Lawrence v. Texas*. Rather, it maintained that Graham did not have standing to raise the statute's unconstitutionality. Relying on *United States v. Raines*, 362 U.S. 17, 21 (1960), the State asserted that application of the statute would not be unconstitutional where "the alleged act involved someone who would have been 13 to 16 years of age between January 12, 1975 and December 31, 1978." (LF 81-82).

The trial court agreed that Graham lacked standing to contest the constitutionality of his prosecution under §563.230. (LF 96). This ruling is erroneous because *the application of §563.230 to Graham* is unconstitutional under the Due Process Clause of the United States and Missouri Constitutions, and his prosecution and conviction

constitute an impermissible attempt to revise that statute by judicial fiat rather than through the legislative process.[14]

In essence, the State argues that Graham could have been constitutionally prosecuted for sodomy with a minor, i.e., statutory sodomy, and that this is a constitutional application of §563.230. It is true that, in *Lawrence*, the Supreme Court

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[14] Moreover, the prudential concerns underlying the standing doctrine are not implicated by this case. The standing doctrine was meant to avoid premature rulings on the constitutionality of a statute where the statute is presumptively constitutional in the vast majority of its applications and the litigant is pressing hypothetical facts unrelated to his case to challenge its constitutionality. It "frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application may be cloudy." *United States v. Raines*, 362 U.S. 17, 22 (1960) In this case, in contrast, there is no legitimate presumption of constitutionality. In *Lawrence v. Texas*, the Supreme Court has definitively declared statutes like §563.230 -- which proscribe sodomy regardless of the circumstances or status of the participants -- unconstitutional. Therefore, the prudential concerns of the standing doctrine are inapplicable. As the *Raines* Court itself acknowledged, the rationale of the standing limitation "may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover." *Id.* at 23. The impact of *Lawrence v. Texas* was to declare §563.230 unconstitutional in the vast majority of its intended applications.

suggested that the Due Process Clause did not prohibit all state regulation of sexual conduct.

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.

Lawrence, supra, at 578. However, Graham was not convicted of committing sodomy with a minor. The trial court expressly refused to instruct on the issue of minority. Graham was simply convicted of committing sodomy, and it is clear, after *Lawrence v. Texas* and the express overruling of *Bowers v. Hardwick*, that no one can be constitutionally prosecuted and convicted for the act of sodomy alone. *See Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 966 (1984) ("The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise….").

C.

This Prosecution of Graham Cannot Be Rendered Constitutional By a Judicial Rewriting of §563.230

In essence the State prevailed upon the trial court to rewrite §563.230 and add a new element to the offense by effectively replacing the phrase "committed with mankind" with the phrase "committed with a minor." Putting aside for the moment that

the trial court then failed to instruct the jury on this new element, an issue discussed in Section IV *infra*, this Court has long recognized – in both the civil and criminal context -- that such revisionism is an improper use of the judicial power. "The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Board of Education of the City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001).

For example, in *Missouri Public Service Company v. Platte-Clay Electric Cooperative Inc*., 407 S.W.2d 883 (Mo. 1966), this Court was asked to "construe" the Rural Electric Cooperative Law to include a provision mandating the termination of an electrical cooperative's operating rights upon the occurrence of certain conditions. The Court refused, noting that the plain language of the Act did not contain such a provision. "Provisions not found plainly written or necessarily implied from what is written will not be imparted or interpolated therein . . . ." *Id*. at 891 (internal citations omitted). This Court went on to state, "[w]e are guided by what the legislature says, and not by what we may think it meant to say." *Id*., *citing United Air Lines, Inc. v. State Tax Commission*, 377 S.W.2d 444 (Mo. 1964). *See also State ex rel. D.M. v. G.J. Hoester*, 681 S.W.2d 449, 452 (Mo. banc 1984) ("[w]e are not at liberty to add by interpolation or otherwise limiting provisions not plainly written or necessarily implied from the language used.").

In *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005), this Court held §566.083.1(1) "patently unconstitutional." *Id.* at 486. That statute made it a crime to "[k]nowingly expose[] the person's genitals to a child less than fourteen years of age in a manner that

would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age." *Id.* at 484-85. The defendant argued that the statute was unconstitutional because the only scienter requirement was that the person knowingly expose his genitals to a child, something that as a practical matter is often unavoidable in a public lavatory. There was no requirement that he knowingly do so in a manner that would cause a reasonable adult to believe that the conduct was likely to cause affront or alarm to a child. The State urged this Court to impose the latter requirement by judicial fiat, "suggesting that the addition is appropriate pursuant to the Court's duty to sustain a statute as against a constitutional challenge if at all possible." *Id*. at 488. This Court rejected the State's invitation to judicially revise the statute by "add[ing] a word that the legislature did not see fit to include." *Id*.

Like the statute in *Beine*, here §563.230 can only survive a constitutional challenge if it is rewritten by the Court. The language of §563.230, which was part of Missouri's criminal code from at least 1835 through 1979 with only minor changes, never went beyond criminalization of the mere commission of the "detestable" act. There is nothing in the language or history of the Act to suggest that the legislature that enacted §563.230 gave separate consideration to the issues of minority or consent. There is certainly no language in §563.230 from which to infer that the General Assembly meant for the statute to apply only to conduct that falls outside the scope of the Due Process liberty protections recognized by the United States Supreme Court in *Lawrence v. Texas*. Indeed, there could not have been, since *Lawrence v. Texas* was decided some twenty-four years after the repeal of §563.230.

The admonition against judicial legislation to save an otherwise unconstitutional statute is particularly compelling in the criminal context where statutes are to be strictly construed against the State. *See Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999). This Court's longstanding refusal to rewrite penal statutes is consistent with opinions of the United States Supreme Court striking down criminal statutes that could only be sustained by resort to judicial legislation. For example, in the seminal case of *United States v. Reese*, 92 U.S. 214 (1875), the Supreme Court considered whether it could insert words of limitation into a penal statute "so as to make it specific, when, as expressed, it is general only" so as to "operate only on that which Congress may rightfully prohibit and punish." *Id*. at 221. The Court emphatically concluded that to insert such language into the statute would improperly encroach on the prerogative of the legislature. "To limit the statute in the manner now asked for would be [to] make a new law, not to enforce an old one. This is no part of our duty." *Id*. at 221. Having concluded that it would be improper for the Court to make a new law, it invalidated the statute *in toto*.

Similarly, in *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964), the defendant challenged the constitutionality of §6 of the Subversive Activities Control Act which made it a crime for a member of a Communist organization to apply for or use a passport. The government argued that even if the law swept too broadly across the liberty guaranteed by the Due Process Clause, the prohibition should be held constitutional as applied to the defendants who were concededly top-ranking Communist party leaders.

The U.S. Supreme Court disagreed because such a limitation would require it to judicially rewrite the statute.

> It must be remembered that although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it.

Id. at 515 (internal quotations omitted). The Court went on to note that the "clarity and preciseness of the provision in question [made] it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." *Id.*

These principles were recently applied by the United States Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997). That case involved a constitutional challenge to the Communications Decency Act, 47 U.S.C. §223(a)-(e), which sought to protect minors from harmful material on the internet. The Act, in 47 U.S.C. §223(a), criminalized the knowing transmission of "obscene or indecent" messages to any recipient under 18 years of age. Under §223(d), the Act also made it a crime to knowingly send or display to a person under 18 any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities…." *Id.* at 844. The Court found that the phrases "indecent" and "patently offensive" were unconstitutionally overbroad and vague. In light of the Act's severability clause and the absence of any constitutional challenge to the phrase "obscene," the Court addressed the constitutional defect in §223(a) by severing the term "indecent" from the text, "leaving constitutional textual elements of the statute intact in

the one place where they are, in fact, severable." *Id.* at 882-83. The Court, however, refused the government's invitation – which is essentially the same argument the State makes in this case – not to invalidate the application of these provisions to "'other persons or circumstances' that might be constitutionally permissible." *Id*. at 883. In declining that invitation, the Court noted that the "open-ended character of the CDA provides no guidance what ever for limiting its coverage." *Id*. at 884. Citing *Reese* and other authorities, the Court observed it' "will not rewrite a … law to conform it to constitutional requirements.'" *Id*. at 884-85 *quoting Virginia v. American Booksellers Assn Inc.*, 484 U.S. 383, 397 (1988).

Section 563.230, like the statutes at issue in *Aptheker* and *Reno,* is indiscriminately cast and open-ended. Given its language, there is no way to save it against constitutional attack. It therefore must be stricken *in toto*. *See United States v. Ju Toy*, 198 U.S. 253, 262 (1905) (where relevant portion of statute is but a single section, it must be valid as to all that it embraces, or altogether void; creation of a class of constitutionally exempted conduct cannot be read into general words for purpose of saving what remains); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) (while it is the duty of a court to attempt to give an act a reasonable construction, a court may not exercise legislative functions to save the law from conflict with constitutional limitation); *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 135 (1913) (court may not insert words to make new penal statute).

To enable this prosecution, the court below, as a first step, had to rewrite a broadly worded §563.230 and transform it into a statute that addresses statutory sodomy --

presuming age parameters and injecting them into the statute by judicial fiat. This Court has recognized that this is not a proper judicial role. Therefore, the application of §563.230 to Graham is unconstitutional. His conviction must be reversed and the indictment dismissed.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT GRAHAM'S MOTION TO DISMISS THE INDICTMENT AND MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE §563.230 RSMO 1969 IS UNCONSTITUTIONALLY VAGUE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT AN INDIVIDUAL CANNOT BE CONSTITUTIONALLY PROSECUTED FOR AN ACT OF SODOMY ALONE UNDER *LAWRENCE v. TEXAS* AND THE STATUTE CONTAINS NO OTHER STANDARDS TO GIVE REASONABLE NOTICE OF THE CONDUCT THAT IS LAWFULLY PROSCRIBED OR TO PROVIDE LAW ENFORCEMENT WITH THE GUIDANCE NECESSARY TO AVOID ARBITRARY AND DISCRIMINATORY APPLICATION OF THE STATUTE SUCH AS OCCURRED IN THIS CASE

Even if by an act of judicial alchemy, a court could excise all of the unconstitutional applications of §563.230, what would be left of the statute would be an incoherent residue: a penal statute that does not mean what it says and which is incapable

of providing guidance to law enforcement on its proper application. As this Court observed in *State v. Young*, 695 S.W.2d 882, 884 (Mo. banc. 1985):

> Vagueness, as a due process violation, takes two forms. One is a lack of notice given a potential offender because the statute is so unclear that "men of common intelligence must necessarily guess at its meaning." The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application.

(Citations omitted).

The trial court rejected the vagueness challenge. This Court's review of constitutional challenges to a statute is *de novo. Rizzo v. State*, 2006 WL 107305 *1 (Mo. banc April 25, 2006). The trial court relied on this Court's opinion in *State v. Crawford*, 478 S.W.2d 314 (Mo. 1972). In *Crawford*, this Court held that the proscription of a "detestable and abominable crime against nature, committed with mankind or with beast" had appeared in the Missouri statute books since at least 1835 and had not been challenged on vagueness grounds during the first 150 years of its existence. The *Crawford* Court held that it was well understood that §563.230 proscribed *all* acts of "sodomy proper, bestiality, buggery, fellatio (oral genital contact) and cunnilingus (oral vaginal contact); 'that is, any unnatural corporeal copulation.'" *Id*. at 318, *quoting State v. Oswald*, 306 S.W.2d 559, 562 (Mo. 1957). The Court held that this litany of sex acts, which it found to be "the commonly understood meaning of the euphemism 'the detestable and abominable crime against nature,'" provided "an ascertainable standard of

guilt within the requirements" of the United States and Missouri Constitutions. *Crawford, supra,* at 318.[15]

But the question in this case is not whether the statute provided an ascertainable standard of guilt in 1972, but whether it contains explicit standards for enforcement today. What is evident now after *Lawrence v. Texas* -- and what was unknown in 1972 -- is that no legislature has the constitutional authority to proscribe the litany of sexual acts that the *Crawford* Court believed were within the scope of §563.230. Therefore, §563.230 provides no explicit standards for enforcement, because the only standard embodied in the statute– the commission of certain sexual acts – cannot be the sole predicate for a constitutionally permissible prosecution. Other elements are necessary, but §563.230 does not indicate what they are. The statute does not refer to consent. It does not allude to, let alone define, minority. It is not premised in any way on the use of force.

The unconstitutional vagueness of §563.230 is a necessary consequence of any attempt to compensate for its fatal overbreadth by judicially recasting the statute to justify a conviction in a particular case. Trying to salvage any part of §563.230 would "necessitate such a revision of its text as to create a situation in which the statute no

[15] Nevertheless, a reason given for the repeal of §563.230 in 1979 was the "ambiguous and outmoded" language of the statute. See §566.010 V.A.M.S. 1999 (Comment to 1973 Proposed Code).

longer gave an intelligible warning of the conduct it prohibited." *United States v. Raines*, 362 U.S. 17, 23 (1960).

Missouri courts have consistently refused to indulge in ad hoc, judicial legislation to preserve some part of an otherwise unconstitutional statute. For example, in *State v. Reproductive Health Services*, 97 S.W.3d 54 (Mo.App.E.D. 2002), the State brought a declaratory judgment action asking that the Missouri courts declare the scope and meaning of the Missouri Infant's Protection Act, which made it a crime to conduct an abortion in a certain manner. The State conceded that no health exception appeared in the plain language of the statute. But it maintained that the Act could be construed to contain an exception to protect the woman's health, an element necessary to support the constitutionality of the Act.

The State argued that the court could read the health exception into the statute because the General Assembly had declared its intention "'to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statute.'" *Id*. at 62, *quoting* §188.010 RSMo. The State argued that the defenses available under the Act could then evolve to incorporate future changes in federal precedent and statutes. *Id.*

The Court of Appeals for the Eastern District rejected this argument. "If this was the legislature's intent, it is not a permissible one because it leaves the statute itself insufficiently clear 'to give reasonable notice of the prohibited conduct and to apprise enforcers of the proper standards for enforcement.'" *Id*. (citations omitted). The court of appeals went on to state that if the State's interpretation were correct, it "could simply

criminalize all abortions except those protected by the United States Constitution, leaving to the courts the task of determining what is permitted and what is not." *Id*. Such a result would "impermissibly delegate to the courts the task of statutory revision, a matter within the exclusive province of the General Assembly." *Id.*

The only way to save §563.230 from wholesale invalidation would be to read into it an exception similar to that which was rejected in *Reproductive Health Services*, that is, to judicially rewrite the indiscriminately broad language of the statute so as to only prohibit conduct falling outside the scope of the liberty interest outlined in *Lawrence v. Texas*. To interpret the statute in this fashion, however, is no more permissible than to interpret the abortion statute as only regulating abortion to the extent permitted by the Constitution. Such a construction impermissibly leaves to the courts the task of determining what is prohibited by the statute and what is not. As the United States Supreme Court stated in *United States v. Reese*, 92 U.S. 214 (1875), "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large." *Id*. at 221. As in *Reproductive Health Services,* such a judicial power to rewrite state statutes cannot give reasonable notice of the prohibited conduct or afford those who must enforce the statute with proper guidance. *See also Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) ("One of the strongest reasons for not making this law a nose of wax, to be changed from that which the plain language imports, is the fact that it is a highly penal statute . . . If we change it to meet the needs suggested by other

laws . . . we are creating by construction a vague requirement, and one objectionable in a criminal statute.").

Given this total lack of standards, the dangers of discriminatory application of this statute are patent. Those dangers are even more dramatic where the statute at issue was repealed over twenty years ago. This appears to be the first application of §563.230 in two decades, and there is serious question whether the State would have pursued a judicial revision of a statute repealed two decades ago but for Graham's status as a Catholic priest.[16] However, that status does not change the Constitution. Graham was prosecuted pursuant to a statute that, in light of *Lawrence v. Texas*, is unconstitutionally vague. This is an independent reason why the conviction below must be reversed.

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[16] Detective Mark Kennedy, an experienced sex crimes investigator, was asked at trial whether it was uncommon to have a delay in disclosure in sex abuse cases. He acknowledged that in his experience in some cases the disclosure was not made until the victim was an adult. (Tr. 429-31).

> I've run across it *but we've never gone after it criminally*. I've run into it with sexual abuse victims that told me in their childhood they had been abused repeatedly by either relatives or neighbors or whatever, and had never told anybody up until that moment.

Id. at 431 (emphasis added). Obviously, a decision was made to prosecute Father Graham despite the practice of not criminally pursuing claims by adults that they were abused as children.

IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT WOOLFOLK DID NOT CONSENT TO THE ACT, EITHER BECAUSE HE WAS DEEMED INCAPABLE OF CONSENT DUE TO HIS AGE OR BECAUSE THE ACT WAS FORCIBLE, AND ERRED IN DENYING GRAHAM A NEW TRIAL IN THAT THE FAILURE TO INSTRUCT THE JURY THAT IT MUST FIND THESE ESSENTIAL ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT VIOLATED APPELLANT GRAHAM'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 18(a) AND 22(a) OF THE MISSOURI CONSTITUTION AND RENDERED §563.230 UNCONSTITUTIONAL AS APPLIED TO HIM UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

Even if §563.230 could be constitutionally applied to Father Graham, the trial court erred in failing to instruct the jury of the need to find beyond a reasonable doubt those elements that the State maintains make this prosecution constitutional despite *Lawrence v. Texas*. Whether a jury was properly instructed is a question of law which is reviewed *de novo. Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003).

Here, the trial court gave the following verdict directing instruction to the jury:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> That on or about January 12, 1975 to December 31, 1978, in the City of St. Louis, State of Missouri, the defendant placed his mouth on the penis of Lynn Woolfolk, then you will find the defendant guilty of sodomy. However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF 106). This instruction, which was marked No. 5, is not part of MAI-CR 3d and was predicated on the version of MAI 12.50 that was in effect prior to the repeal of §563.230. (Tr. 590). Defense counsel made the following objection, which was overruled by the trial court.

> MR. GOEKE: I object to the instruction number five, the verdict director. It is unconstitutionally vague. It is unconstitutionally overbroad and it lacks mens rae (*sic*). There is no requirement that there be any sort of an age of the victim, nor does it require that there be any sort of force and as such I believe is unconstitutional and on that basis I object to it being presented to the jury.
>
> THE COURT: I believe that these were some of the similar grounds in your motion to dismiss that was ruled on by Judge McCullin so your objection is noted and it will be overruled at this time.

(Tr. 591-92).

"[A]n essential of the due process guaranteed by the Fourteenth Amendment" is "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). "[F]acts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis." *Harris v. United States*, 536 U.S. 545, 547 (2002). The trial court erred below in failing to submit to the jury an element of the offense that defines the line between conduct the State may constitutionally punish and conduct that is constitutionally protected. That line defines the limit of the judicial power to impose punishment. Under the Due Process Clause, only the jury is empowered to determine if a defendant transgressed that line. In this case, over objection, it was not given the opportunity to do so.

This error resulted in an unconstitutional application of §563.230 to Graham. Where, an error is of constitutional magnitude, Missouri follows the test set out by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967); *State v. Whitfield*, 107 S.W.3d 253, 262 (Mo. banc 2003). Under the *Chapman* test, before a federal constitutional error can be held harmless, the court must be able to declare a belief

that it was "harmless beyond a reasonable doubt." *Whitfield*, 107 S.W.3d at 262. The beneficiary of the constitutional error, the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. (internal quotation omitted); *see also State v. Driscoll*, 55 S.W.3d 350, 356 (Mo. banc 2001).

This it cannot do. Lack of consent is the essential predicate for criminalizing the alleged sexual conduct. The relevant facts were hotly contested. Graham denied any sexual contact with Woolfolk at any time, let alone when Woolfolk was under the age of 17 -- or whatever other age of minority a court would have to read into §563.230 to render it constitutional. The jury was not instructed to find that Woolfolk was under any particular age at the time of the alleged sexual conduct.[17]

Because lack of consent, actual or constructive, was never presented to the jury, there is no way to determine how that error influenced the jury verdict. There is certainly no basis upon which to conclude the error was harmless. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). Woolfolk's testimony was the only evidence of sodomy with Graham, and his testimony of the timing of this event was extraordinarily vague. He testified that he was "[m]aybe about 13, 14" at the time. (Tr. 266). Yet he could not identify a month or year in which the act occurred, and the only definiteness in his testimony was that the events occurred at the Old Cathedral. It was undisputed that

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[17]This is in contrast to the current instructions for statutory sodomy in the first and second degree under sections 566.062 and 566.064 RSMo. The instructions for those offenses specifically require the jury to find beyond a reasonable doubt that the victim was below a certain age at the time of the offense. MAI Cr. 3d 320.11, 320.13.

Graham was assigned to the Old Cathedral until 1980, when Woolfolk would have been 18. Woolfolk acknowledged on redirect examination that his age at the time any act of sodomy occurred was not important to him. (Tr. 375). Moreover, in his letter, State's Exhibit 7, Woolfolk effectively informed the jury that he believed that he had sexual contact with Graham into the 1980s.

Essentially the trial court, by default, decided the critical issue of lack of consent and did so pursuant to a legal standard that was never disclosed to the parties, let alone the jury. Did the Court conclude that if the sexual conduct occurred it was before the age of 18 or 17 or 14? And by what legal standard did it presume that at that time Woolfolk was incapable of consent? Graham had a due process right to both a legislative determination of the legal standard for punishment and a jury determination whether the facts met that standard. He received neither. This type of error fundamentally undermines the purpose of the jury trial guarantee and can never be harmless.

Not only was the jury not instructed that minority or lack of consent was an element of the offense -- and of the importance of finding that element beyond a reasonable doubt -- but the instruction that was given did not even implicitly require the jury to find that any sexual contact occurred before Woolfolk's 17th birthday or even before §563.230 was repealed. The jury was instructed that it had to find from the evidence beyond a reasonable doubt that "**on or about** January 12, 1975 to December 31, 1978, in the City of St. Louis, State of Missouri, the defendant placed his mouth on the penis of Lynn Woolfolk." "About" means "near" or "in the vicinity." Webster's Third New International Dictionary 5. Thus the jury was instructed that it could find Graham

guilty of a violation of §563.230 if it concluded that the act occurred near or in the vicinity of the date range January 12, 1975 to December 31, 1978. Certainly January 1, 1979 or January 12, 1979 is "near" or "in the vicinity" of this date range. Yet January 1, 1979 is the date §563.230 was repealed. January 12, 1979 is the date Lynn Woolfolk turned 17. The jury verdict is not inconsistent with a jury conclusion that the act of sodomy occurred on or after either date. This is certainly a case where "[t]his Court cannot say with confidence that the error complained of did not contribute to the verdict and for that reason this Court cannot hold that the constitutional error was harmless beyond a reasonable doubt." *State v. Driscoll*, 55 S.W.3d 350, 358 (Mo. banc 2001).

Indeed, the instructional error in this case cannot even meet the standard for nonconstitutional instructional error. Supreme Court Rule 28.02 requires that the MAI-CR instructions be used if applicable and provides that "giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03." The instruction in this case was based on the old MAI-CR 12.50. As this Court has emphasized, if an MAI instruction conflicts with the substantive law, the trial court should refuse to follow it or its Notes on Use. *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). "Procedural rules adopted by the MAI cannot change the substantive law and must therefore be interpreted in light of existing statutory and case law." *Id*. (internal citations omitted).

Thus, if the trial court had any authority to rewrite §563.230, it had a duty, particularly in light of the objection, to modify MAI 12.50 to conform with *Lawrence v.*

Texas. The failure to do so was clearly prejudicial. The defendant disputed that any sexual contact occurred at any time during Woolfolk's minority or afterward. The jury was not advised of the importance of Woolfolk's age at the time of any sexual contact, let alone that it had to be an element proved beyond a reasonable doubt. Thus the failure to instruct on lack of consent prejudiced the defendant. *See, e.g., State v. Carson*, 941 S.W.2d 518, 523 (Mo. banc 1997) (prejudicial error not to instruct on knowledge where knowledge at issue). An error is prejudicial if it lessens the State's burden of proof by failing to submit all necessary factual issues to the jury. *See, e.g., State v. Strughold*, 973 S.W.2d 876, 884 (Mo.App.E.D. 1998). There is no doubt that the instruction submitted lessened the State's burden of proof regarding Woolfolk's age at the time of the alleged act of sodomy and therefore prejudiced Graham. Therefore, even if Graham can otherwise be constitutionally prosecuted under §563.230, the failure to instruct on lack of consent or minority requires reversal of the conviction below and a remand for a new trial.

V.

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE STATE'S EXHIBIT 7, AND ALLOWING THAT EXHIBIT TO GO TO THE JURY DURING DELIBERATIONS, AND BY DENYING APPELLANT GRAHAM'S MOTION FOR A NEW TRIAL, BECAUSE THAT EXHIBIT, A FIVE-PAGE LETTER BY WOOLFOLK, WAS TESTIMONIAL IN NATURE, INADMISSIBLE HEARSAY, INCLUDED EVIDENCE OF UNCHARGED CRIMES, AND IMPROPERLY BOLSTERED WOOLFOLK'S TESTIMONY AND DENIGRATED GRAHAM'S CREDIBILITY, THEREBY PREJUDICING GRAHAM IN THAT ITS ADMISSION AND PROVISION TO THE JURY DURING DELIBERATIONS DEPRIVED HIM OF A FAIR TRIAL, AS WELL AS HIS CONFRONTATION RIGHTS AND RIGHT TO BE TRIED ONLY FOR THE OFFENSE CHARGED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 17 AND 18(a) OF THE MISSOURI CONSTITUTION.

Even if this prosecution is not barred by the statute of limitations, and even if the Court concludes that somehow §563.230 can be constitutionally applied to Father Graham, his conviction must be reversed because the trial court sent into a jury room, over objection, a letter written by Woolfolk that was grossly prejudicial, highly inflammatory, and in complete derogation of Graham's confrontation rights under the United States and Missouri Constitutions. This letter, which was purely testimonial in character, accused Graham of uncharged sexual misconduct, highlighted and embellished

Woolfolk's trial testimony, contained improper commentary on the credibility of Graham and the Catholic Church hierarchy, and improperly bolstered Woolfolk's credibility with self-serving descriptions of his "good works" and suffering – all without the test of cross-examination. The prosecution exploited this document by urging the jury to ask that it be sent to the jury room, describing it as "giv[ing] the true nature of what Lynn was trying to say." (Tr. 609-10).

The reception of evidence by the trial court is reviewed for abuse of discretion. *E.g.*, *State v. Driscoll*, 55 S.W.2d 350, 354-55 (Mo. banc 2001). Trial court error requires reversal where there is a reasonable probability that the trial court's error affected the outcome of the trial. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). Here, the admission and publication to the jury of Woolfolk's letter stripped the trial and conviction below of any pretense of fairness and mandates a new trial.

A.

References to the Letter at Trial

Exhibit 7 is a five-page single spaced letter that Woolfolk testified he delivered to the Archdiocese in October 1998. (LF 146-150). It sought a monetary settlement of his allegations against Graham. The letter was delivered after the dismissal of his first civil lawsuit and before the filing of the second. Woolfolk was asked about the letter on cross-examination after he testified at least four times on direct that it had never been his intent to get rich on his allegations against Graham, and that he dismissed his first suit on the advice of his lawyer. Woolfolk acknowledged on cross that in the letter he seeks $30,000

from the Archdiocese and informs the Archdiocese that if it pays him the money with no lawyers involved it will never hear from him again. (Tr. 357, 361-62).

The prosecutor on redirect elicited testimony from Woolfolk that the letter reflected that he wanted an apology and reimbursement for his current and future therapy sessions, that he filed the first suit out of anger and never wanted to sue the Church, and that "[he] wanted justice to be served." (Tr. 376-78). On re-cross Woolfolk read into the record a portion of the letter that suggested that the dismissal of the first lawsuit was his idea. The passage discussed how the death of a friend and a Catholic mass in a poor village in a foreign country resulted in a decision to dismiss the first lawsuit. (Tr. 386-88). All of these references relate to parts of the last half of the letter. (LF 148-150).

Given this limited use of Exhibit 7 during Woolfolk's testimony, when the prosecutor moved the exhibit into evidence, defense counsel carefully responded, "I have no objection at this time, Your Honor, but I request the right to address it at a later time if it becomes necessary." (Tr. 379). At the close of the evidence, defense counsel objected to the admission and publication to the jury of this exhibit. He maintained that the majority of the contents of Exhibit 7 had not been brought out in the testimony of any witness, and that allowing the jury to review it would in essence allow them to hear additional testimony from Woolfolk without the benefit of cross-examination. The prosecutor responded that although not every word had been read from the witness stand, there had been an opportunity to cross-examine on everything in the letter and that "pretty much everything that is in there was touched on in some way, shape or form, so it's just, you know, a matter of some words here…some words there that weren't simply

read off of the letter." (Tr. 593-94). Defense counsel responded that the testimony only related to the latter part of the letter and the rest was not the subject of testimony and irrelevant. (Tr. 594-95). The trial court reviewed the letter, stated that it did not contain anything that was not mentioned at trial, and overruled the objection. (Tr. 595-56).

During closing arguments, the prosecutor implored the jury not once, but twice, to request Exhibit 7 and to read all of it. He highlighted the exhibit by referring to it at as the last point of his closing argument, and then again at the end of his rebuttal argument:

> And, ladies and gentlemen, I ask you to look at the exhibits in this case. Don't forget, in addition to what wasn't passed, this letter as State's Exhibit Number 7, a lot of cross-examination was done on this, but, you know, a lot was read in and this gives the true nature of what Lynn was trying to say and of what Lynn did say and you heard it. But look at the exhibits and I ask at the close of your deliberations you return a verdict of guilty as to the count of sodomy.

(Tr. 609-10)

> Ladies and gentlemen, Lynn Woolfolk's testimony was presented to you. You had an opportunity to hear it. This stuff about a lawsuit, come on, it just doesn't fly. He knows that – this is not about money, and again, I ask you to ask for this exhibit. I mentioned it. The defense mentioned it. Read this letter.

(Tr. 632).

The jurors responded to the prosecutor's plea by requesting Exhibit 7 only eighteen minutes after they retired to the jury room. (LF 103; Tr. 633). The trial court noted the

objection previously lodged by defense counsel, but provided the jury with the exhibit. *Id.* Less than three hours later, the jury returned with a guilty verdict. (Tr. 633-36).

B.

The Contents of Exhibit 7

The trial court was correct in saying that parts of Exhibit 7 had been the subject of Woolfolk's testimony at trial, but it failed to recognize that by sending this letter to the jury room that testimony was highlighted and embellished without cross-examination or any corresponding reminder of Graham's testimony. Moreover, the trial court could not have been more wrong in inexplicably concluding that the letter "did not contain [] anything that wasn't mentioned in trial." (Tr. 595-96). When during deliberations the jury read the letter for the first time, they read allegations, attacks on the credibility of Graham and the Catholic Church, and self-serving bolstering of Woolfolk's own credibility that they had never heard before and that would have been improper testimony from the witness stand.

In the letter Woolfolk made allegations of sexual misconduct by Graham that the jury had not heard during the trial testimony.

> After his stay [at the Old Cathedral], Fr. Graham got assigned to be the first Pastor at St. Albin's [*sic*] in Glencoe Mo. Prior to the new church being built, Fr. Graham stayed in some houses out in the area. He would have me out to visit, have sex with me and then pay me. After moving into the new rectory it continued.

(LF 146).

The letter berated what Woolfolk portrayed as the callousness of the Catholic Church. Invoking God and Martin Luther King, Woolfolk wrote:

> This abuse was magnified when I turned to the church leaders who seemed to only support the priest in question. Never mind the victim. This abuse not only had a profound effect on my life, but the life of my family as well.

(LF 146).

> I left the meeting [with Archbishop Rigali] feeling about as low as a person can feel. That I had been slapped in the face and emotionally abused. That I had been ignored and silenced again. This time by the leaders of the church who are to be compassionate and caring. Who represent the truth of God's love.

(LF 148).

> Martin Luther King once said, "How long will justice be crucified, and the truth buried." As God is my witness and judge, what I am relating is the truth. That is my justice, setting the truth free. Pedophilia is a monstrous disease that must be acknowledged and addressed. Too many people have been ignored and silenced for too long. Too many people have suffered for too long. The victims of this abuse have been ignored, silenced, ridiculed, slandered and violated for too long.

(LF 149).

The letter contained self-serving hearsay that improperly bolstered Woolfolk's credibility and sympathy with the jury and effectively served as victim-impact testimony during the guilt phase of the trial:

> I cannot begin to describe to you the hurt, the pain, the trauma, the struggle, the confusion, the loss of trust, the loss of my virginity, the emptiness, the shame, the guilt, the anger, the hatred, the bitterness, the mixed and confused emotions that have been a part of my life because of this abuse.

(LF 146).

> I do not have specific dates and times. I have only sordid and painful memories of some of these events which I have already mentioned. These memories are seared in my memory to this day and will be for the rest of my life.

(LF 146).

> I felt like the lowest and most worthless human being on earth.

(LF 147).

> I even went to the brink of contemplating suicide.

(LF 147).

Woolfolk referred to the death of his mother and the untimely death of his friend. (LF 148). And, at the very end of the letter, he listed his activities with the Church, which again improperly bolstered his credibility and appealed to the jury's sympathy:

> Prior to 1994, and falling away from the church, I spent many years volunteering in various functions of the Catholic church. I worked with the youth council which included me giving up a weeks vacation for 8 years at the Christian Leadership Institute. I worked with the North side parishes sometimes through the St. Charles Lawanga Center by chairing the North Side Revival for 3 years. I sang in the church choir, the North Area Choir, and the MLK Choir. Now that I have started back to church, I feel that I cannot get fully involved and become an active member until this situation

> is resolved. The only heavy thing on my heart is this situation. I have spoken my truth and prayed for forgiveness. I now pray that you will help me bring this to some closer [*sic*].

(LF 150).

C.

The Admission of Exhibit 7 was Erroneous

The admission of Exhibit 7, the Woolfolk letter to the Archdiocese, and its publication to the jury destroyed any prospect of a fair trial in this case. It was tantamount to sending a closing argument into the jury room that was not limited by the evidence presented or the rules that ensure the integrity of the fact finding process. The results were a verdict and sentence infected with prejudice.

Defense counsel had used the letter during Woolfolk's cross-examination for a limited purpose: to impeach the repeated testimony on direct that there was no financial motive for Woolfolk's allegations against Graham. Woolfolk testified on direct that he dismissed the first lawsuit on advice of his lawyer. A passage in the letter supported the implication that he dismissed the first lawsuit because he wanted to attempt a settlement with the Archdiocese that would not require sharing the proceeds with an attorney. The prosecutor then referred to portions of the letter which indicated Woolfolk wanted the money for therapy and had been reluctant to sue the Church. On re-cross the defense asked him to read a portion of the letter which again suggested that the first lawsuit was dismissed at Woolfolk's instance and not on the advice of his attorney.

This limited use of Exhibit 7 did not justify the wholesale admission of Exhibit 7, particularly in light of the objectionable content of the portions of the letter that were not alluded to in any way during the trial testimony. Those portions of the letter were inadmissible because they constituted hearsay, evidence of uncharged crimes or bad acts, unduly highlighted and embellished Woolfolk's trial testimony, and improperly bolstered his credibility and disparaged the credibility of Graham.

1.

The Letter was Hearsay

Woolfolk's letter was hearsay and should never have been admitted into evidence. It was clearly an out-of-court statement offered to prove the truth of the matters asserted. Any pretext that it was offered for any other purpose evaporated when the prosecutor urged the jury to ask for the exhibit because it "gives the true nature of what Lynn was trying to say." (Tr. 609-10). The letter was not within any exception to the hearsay rule.

The principal purpose of the hearsay rule is to enhance the trustworthiness of testimonial assertions by affording an opportunity to test the credibility of the witness through cross-examination. *State v. Jaynes*, 949 S.W.2d 633, 635 (Mo. App. E.D. 1997) (reversing conviction where trial court admitted letter from victim's insurer); *see also Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004) (right to cross-examine essential and indispensable, citing *Jaynes*). Graham was not afforded the opportunity to test Woolfolk's credibility regarding significant portions of Exhibit 7

because both the defense and prosecution limited Woolfolk's examination to narrow portions of the exhibit dealing with his motive in dismissing the first civil lawsuit.

It is well-established in Missouri that the use of a document for impeachment purposes does not make it admissible generally, let alone on matters extraneous to the topics for impeachment.

> Absent the introduction of evidence to establish statements contradicting the testimony given by the witness, impeachment resulting from mere cross-examination is insufficient to render admissible prior extrajudicial consistent statements; and even though the witness be impeached by prior inconsistent statements, extrajudicial prior consistent statements on subject matters foreign to that on which the witness was impeached remain incompetent and inadmissible.

State v. Fleming, 188 S.W.2d 12, 16 (Mo. 1945).

The application of these principles is illustrated by *State v. Tyler*, 676 S.W.2d 922 (Mo.App.E.D. 1984). In that case, after the victim had testified, a police officer was allowed to testify about statements made by the victim that the victim did not relate during her testimony. These statements were also in certain respects in conflict with the victim's in-court testimony. The *Tyler* court held that admission of the police officer's testimony was reversible error. The court rejected the State's argument that the statements were admissible under the doctrine of curative admissibility. Although the defense counsel had asked about the statements first, the court found that he had only opened up one issue; thereafter, "the state exceeded the limited application of the doctrine [of curative admissibility] and went into uninvited areas. . . ." *Id.* at 925. The court

determined that some of the hearsay testimony likely influenced the jury to be punitive, as it dealt with threats of death by the defendant and the victim hearing clicking noises from the defendant's handgun. The *Tyler* court concluded:

> The court erred in permitting the hearsay evidence. It was not invited or curative of any questions asked on cross-examination. It may have been prejudicial in the determination and assessment of punishment. The possibility of prejudice is not excluded simply because the speaker was an in-court witness who gave conflicting and opposite testimony. Error is presumed prejudicial in the result and the prejudice attaches unless it may be found not prejudicial to the result as a matter of law.

Id. at 926. [18]

Even in civil cases, Missouri courts have long held that the portion of a written statement used to impeach a witness may be offered in evidence, but the whole of the written instrument "is [not] for the jury." *E.g., Walsh v. Terminal R. Ass'n*, 182 S.W.2d 607, 611 (Mo. banc 1944) (reversing verdict where trial court, at plaintiff's request,

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[18] The *Tyler* court explained the doctrine of curative admissibility in the context of that case:

> If on redirect the questions concerning statements in the report had been used to complete, explain or contradict the answers given on cross-examination, it would be admissible under that doctrine. The introduction of a document into evidence is a waiver of objection to the use of the document only as to the issues used in the original use of the document.

State v. Tyler, 676 S.W.2d at 925.

admitted entire written statement of witness, portions of which were initially used by defendant for impeachment, and plaintiff referred to statement in closing in inflammatory manner). Given the confrontation rights of a criminal defendant, Missouri courts have generally rejected unfettered use by an opponent of documents referenced for impeachment or other limited purposes. *See, e.g., State v. Moffitt,* 754 S.W.2d 584, 588 (Mo.App.S.D. 1988) (trial court properly refused prosecution's offer into evidence of letter written by mother of rape victim, portion of which used by defense for impeachment); s*ee also State v. Martin,* 616 S.W.2d 80, 81 (Mo.App.E.D. 1981) (admission of hospital record to show test result did not mean defense could read to jury portion relating victim's past sexual history).

2.

The Letter Contained Inadmissible Evidence of Uncharged Crimes or Bad Acts

The erroneous admission of State's Exhibit 7 was clearly prejudicial because it contained allegations of later, uncharged sexual misconduct by Graham toward Woolfolk. Specifically, in his letter to the Archdiocese, Woolfolk alleged that Graham paid him for sex when Graham was assigned to St. Alban's Parish. Admission of this evidence, which was hearsay and not the subject of any trial testimony, would have been improper even had it not been hearsay. Evidence of other crimes, *i.e.*, crimes other than those for which an accused is presently standing trial, violates the defendant's right, under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 17 and 18(a) of

the Missouri Constitution, to be tried only for the offense for which he was charged. *State v. Burns*, 978 S.W.2d 759, 760-61 (Mo. banc 1998); *see also State v. Wright*, 582 S.W.2d 275, 277 (Mo. banc 1979) (reversing conviction due to evidence of another crime); *State v. Reese*, 274 S.W.2d 304, 307 (Mo. banc 1954) (admission of evidence defendant involved in robbery after charged crime of murder reversible error). Evidence of other crimes is "highly prejudicial" and should be received only when there is "strict necessity." *State v. Collins*, 669 S.W.2d 933, 936 (Mo. banc 1984) (reversing conviction for sale of marijuana where court allowed unnecessary evidence of other sales). It was totally unnecessary to admit Exhibit 7 into evidence in this case.

The Missouri Court of Appeals for the Western District recently cataloged the risks associated with admission of uncharged crimes evidence to include:

> "(1) that the introduction of evidence of other crimes will mislead or confuse the jury, (2) that the jury will give undue weight to the 'if he did it once, he'll do it again' inference, (3) that the defendant will be made to defend, not just against the charges brought, but against all of his prior, similar behavior which, for whatever reason, was not prosecuted by the State, and (4) that the jury, in its rush to punish the defendant for his past acts – which the jury must infer have gone unpunished –may overlook the fact that the State has failed to prove the defendant was guilty of the charges brought."

State v. Berwald, 186 S.W.3d 349, 358 (Mo.App.W.D. 2005) (reversing conviction of defendant for statutory rape and sodomy where witnesses testified about uncharged

sexual conduct in past), *quoting State v. Bernard*, 849 S.W.2d 10, 22 (Mo. banc 1993) (Robertson, C.J. concurring in part).

Those risks are evident in this case. As is discussed in Section IV *supra*, the jury was not instructed on the importance of Woolfolk's age at the time of the offense . Nor was it instructed to treat the Woolfolk letter as anything other than substantive evidence. The jury was likely to be confused about the significance of the conduct alleged to have occurred at St. Alban's and regard it as evidence of the crime charged, even though, unbeknownst to the jury, Graham was at St. Alban's after §563.230 was repealed and after Woolfolk turned 17. This allegation of sex for pay at St. Alban's, which Graham had no opportunity to respond to, certainly created the inference that if it happened at St. Alban's, it happened at the Old Cathedral and enhanced the State's prospects for conviction.[19]

As for forcing a defendant to defend uncharged conduct, the prejudice is even greater here because Graham *never got the chance to defend* the uncharged conduct. And by highlighting the Woolfolk letter as what "Lynn was *trying* to say," the prosecutor

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[19] Prior to trial, Graham filed a motion in limine to exclude any evidence related to allegations of occurrences after December 31, 1978. (8/25/05 Tr. 2-11). The prosecutor represented that if, during the course of the trial, it became necessary to go into any aspect of a sexual relationship alleged to have occurred at St. Alban's, "I will ask the Court to go sidebar and approach it there. . . I'll bring it up with the Court before I do that in open court." (8/25/05 Tr. 10-11). No such warning was provided with respect to Exhibit 7.

elevated its importance above Woolfolk's trial testimony and invited the jury to base its verdict on the contents of the letter. In *State v. Conley*, 938 S.W.2d 614, 620 (Mo.App.E.D. 1997), a conviction for sodomy and sexual assault was reversed where a letter admitted into evidence referred to sexual misconduct for which defendant was no longer on trial. This Court had reversed an earlier conviction of Conley also due to admission of uncharged sexual misconduct, noting that "the probative value of such evidence is far outweighed by its prejudicial effect." *State v. Conley*, 873 S.W.2d 233, 237 (Mo. banc 1994).

Woolfolk's letter also involved alleged activity subsequent rather than prior to the offense alleged in the indictment. In an early decision by the Court that is directly on point, *State v. Amende*, 92 S.W.2d 106 (Mo. 1936), the Court reversed and remanded a conviction for statutory rape due to the improper admission of evidence of subsequent, uncharged sexual encounters between the defendant and the prosecutrix. The Court held that such evidence is incompetent under any circumstances, emphasizing:

> We think the evidence of subsequent acts of intercourse in the case at bar are especially harmful to the appellant because on the date alleged in the information the prosecutrix was over fifteen years of age, and the information was not filed until she was nearly twenty years of age. She would not undertake to fix a date of the second, third, or fourth acts of intercourse. These acts may have taken place after she was sixteen years of age, and if they did the appellant would not be guilty of statutory rape. The information only alleged one act of intercourse, and that having been committed on the – [*sic*] day of October, 1929.

Amende, 92 S.W.2d at 106.

3.

The Letter Improperly Bolstered the Testimony and Credibility of Woolfolk and Attacked the Credibility of Graham and the Catholic Church

It is improper to reiterate or highlight testimony in such a way that it is given undue emphasis by the jury. *State v. Wolfe*, 13 S.W.3d 248, 257 (Mo. banc 2000) (improper bolstering occurs when an out-of-court statement of a witness is offered solely to duplicate or corroborate trial testimony). As this Court noted in *State v. Seever*, 733 S.W.2d 438, 441 (Mo. banc 1987), "[w]hen a witness testifies from the stand, the use of duplicating and corroborative extrajudicial statements is substantially restricted." The danger of such bolstering is that "[t]he party who can present the same testimony in multiple forms may obtain an undue advantage." *Id.* In *Seever*, this Court reversed a defendant's conviction for sexual abuse where the State first played a videotaped statement of the victim, and then called the victim live to the stand to repeat "the same precise ground." *Id.* As the Court recognized:

> There are cases in which the receipt of a witness's extrajudicial statements in evidence has been held to be harmless error, on the ground that the statements added nothing of substance and the witness was available for cross-examination. Those cases are not appropriate here. The statement and the testimony covered the same precise ground. This bolstering is a departure from the normal course of trial proceedings. There were sharply contested fact issues in the case, including the defendant's frank and total denial. We cannot say there was no prejudice.

Id. While the statute governing the introduction of statements of child victims, §492.304 RSMo, has been amended since *Seever* to allow properly prepared statements of minor victims to be admissible even when the victim also testifies, that statute is inapplicable because Woolfolk, when he wrote the letter and at the time of trial, was well above the age of majority.

In *State v. Churchill*, 98 S.W.3d 536 (Mo. banc 2003), the Court reversed the conviction of a defendant in a statutory sodomy case because of bolstering in the form of the prejudicial admission of testimony by an examining physician that the victim's abuse was real. The *Churchill* Court held that this testimony infringed upon the decision-making function of the jury and prejudiced defendant by bolstering the victim's testimony with the credibility of a professional. *Id.* at 538-39. The Court found the bolstering to be particularly prejudicial because, as in this case, there was no physical evidence of sexual abuse and the state's other evidence consisted solely of the victim's account. *Id.* at n.8.

Exhibit 7 improperly bolstered Woolfolk's credibility not only by restating his testimony, but by including references designed to elicit the jury's sympathy, such as his hurt and pain, his thoughts of suicide, the deaths of his mother and his friend, and his work for the Catholic Church. These matters have no relevance to the jury's decision on guilt, but serve only to generate sympathy for the accuser.

The Woolfolk letter also improperly attacked the credibility of Graham. Woolfolk wrote:

> Sadly, I would learn in a most hurtful way that Fr. Graham did not tell the truth. That Fr. Graham abused his authority. That Fr. Graham had power over the powerless. That Fr. Graham told lies in a twisted and perverted way that made my family and me believe him. …

(LF 146).

One way or another Fr. Graham was going to pay for the damage and lies. (LF 148).

> Abuse and lies cannot be honored by the God that created us in His image. What happens to Fr. Graham I have no control over. His time will come on judgment day.

(LF 149). He also expressed his belief that he had been lied to by Church officials, including the Archbishop. (LF 148)

None of this would have been permissible testimony from the witness stand. As this Court observed in *State v. Link*, 25 S.W.3d 136, 143 (Mo. banc 2000), "it is proper for a witness to testify to specific facts that discredit the testimony of another witness, as long as the witness does not comment directly on the truthfulness of another witness." Woolfolk was able to comment directly on Graham's credibility in the most inflammatory way, and do so without any possibility of cross-examination or rebuttal.

B.

The Trial Court Compounded the Error of Admitting Exhibit 7 by Providing This Testimonial Exhibit to the Jury During Deliberations

Even if Exhibit 7 had been properly admitted, it was an abuse of discretion to send it to the jury room in light of its contents and limited use during trial. It is well-settled in Missouri that a jury may not, as a matter of right, take exhibits to the jury room, and that the trial court's decision whether to allow them to do so may, under the circumstances, constitute an abuse of discretion. *State v. Arrington*, 375 S.W.2d 186, 193 (Mo. 1964); *see also State v. Brooks*, 675 S.W.2d 53, 57-58 (Mo.App.S.D. 1984) (trial court's refusal to allow telephone bill documenting defendant's location on date in question to go to jury room was not abuse of discretion where sending only that exhibit would have unduly highlighted and emphasized that particular evidence).

To the extent a writing merely reiterates trial testimony, it can be characterized as testimonial evidence. The general rule in Missouri is that exhibits that are testimonial in nature cannot be given to the jury during its deliberations. *State v. Evans*, 639 S.W.2d 792, 795 (Mo. banc 1982). The exception to this rule applies to written or recorded confessions by the defendant, which is clearly not applicable to Exhibit 7. *Id.* To the extent that a testimonial exhibit is merely cumulative to oral testimony at trial, the concern about sending it to the jury room is that it unduly highlights certain evidence at the expense of other evidence to the prejudice of the defendant. The prejudice is patent in this case, because the trial was a credibility contest between two individuals – accuser

and defendant -- regarding events that had occurred many years before. Due to the passage of time, there were essentially no sources of corroboration for either witness. In this context, it is highly prejudicial to the defendant to allow a written statement of the accuser's version of events to go to the jury room. In this case it dramatically highlighted the accuser's testimony to the detriment of the defendant.

Of course, Exhibit 7 did much more than improperly highlight trial testimony. It was a diatribe against Graham that injected new allegations into the case and appealed to the prejudices and sympathies of the reader in a manner calculated to incite prejudice against Graham. This raw, vitriolic appeal was unfiltered by cross-examination or the rules of evidence. Its transmittal to the jury room violated Graham's confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution and rendered his trial fundamentally unfair. Even if Graham can be prosecuted under a constitutionally flawed statute more than 25 years after an event was alleged to have occurred, he is still entitled to a fair trial. The admission of Exhibit 7 and its transmittal to the jury clearly denied him one. Therefore, if the Court concludes that there are no constitutional or limitation impediments to this prosecution, the conviction and sentence below must be reversed and this case remanded for a new trial.

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT GRAHAM'S MOTION FOR A NEW TRIAL BECAUSE THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT RESULTED IN PREJUDICIAL ERROR WHICH AFFECTED THE SUBSTANTIAL RIGHTS OF GRAHAM AND DEPRIVED HIM OF A FAIR TRIAL IN THAT THE PROSECUTOR MADE STATEMENTS SUGGESTING WOOLFOLK WAS TARGETED FOR THE OFFENSE BECAUSE OF HIS RACE, THAT THE PRAYER FOR DAMAGES IN WOOLFOLK'S CIVIL LAWSUITS REFLECTED THE AMOUNT HE SOUGHT TO RECOVER, AND THAT ANY CIVIL JUDGMENT WOULD HAVE BEEN PAID BY THE ARCHDIOCESE RATHER THAN GRAHAM, WHICH STATEMENTS WERE (1) NOT SUPPORTED BY FACTS IN EVIDENCE; (2) CALCULATED TO INCITE AND APPEAL TO RACIAL PREJUDICE; AND (3) MISTATEMENTS OF THE FACTS AND LAW IN THAT THERE WAS NO EVIDENCE WOOLFOLK WAS "TARGETED" BECAUSE OF HIS RACE, THE PRAYER IN THE CIVIL LAWSUITS WAS FOR JURISDICTIONAL PURPOSES ONLY, AND GRAHAM WAS AN INDIVIDUAL DEFENDANT IN THE CIVIL LAWSUITS AND THEREFORE SUBJECT TO AN AWARD OF MONEY DAMAGES

A.

The Prosecutor's Statement in Closing Argument that Woolfolk was Targeted for the Offense Because of His Race Constituted Plain Error.

During his closing argument, the prosecutor argued that Lynn Woolfolk was targeted for the charged offense because he was African American and therefore would not have been believed had he told anyone that Graham molested him. Pursuant to Missouri Supreme Court Rule 30.20, Graham requests plain error review of this sub-point. A claim of plain error lies where, as here, there are substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. *State v. Zindel*, 918 S.W.2d 239, 241 (Mo. banc 1996).

The prosecutor argued as follows:

> And look at it, ladies and gentlemen, is it any surprise that Lynn Woolfolk is the person who received this from him? Lynn's a perfect target kid. Here is this child. Here is this priest. He moves into this new congregation and gets involved with the community service and gets to know people. Gets to know some people from this African-American, you know, congregation that's closing down the cemetery, that's having issues and, you know, remember, this is the 1970s, attitudes are a little different. Who are people going to believe, this kid or me, the priest?

(Tr. 607).

The implications in this argument are not subtle. The prosecutor did not argue that in the 1970's any teenager who made an allegation against a priest would not be believed.

Rather, Woolfolk was described as "the perfect target kid." What distinguished him from other kids? The only reason offered by the prosecutor was Woolfolk's affiliation with an African-American congregation, and the only reasonable inference created by his argument was that Graham thought no one would believe an African-American teenager's allegations against a white priest. "Here is this child. Here is this priest." Surely the inference was not lost on a predominantly African-American jury.[20] The prosecutor's argument was a patent invitation to the jury to impute racial animosity or exploitation to Graham. "Where the prosecutor's deliberate statements appeal to racial prejudice or where he interjects race in a derogatory manner so as to inflame the minds of the jury, his comments are improper and may constitute reversible error." *State v. Stamps*, 569 S.W.2d 762, 767-68 (Mo.App.E.D. 1978).

Moreover, "[a] prosecutor may not argue facts outside the record." *State v. Storey*, 901 S.W.2d 886, 900-01 (Mo. banc 1995) (prosecutor improperly argued that murder was most brutal slaying in history of county where there was no evidence about brutality of other murders in county). There was no evidence in the record to suggest that Woolfolk was somehow "targeted" by Graham, much less that he was "targeted" because he was African American. Nor was there evidence of attitudes in the 1970's. Taken in the light most favorable to the State, the evidence only showed that Graham had a close personal

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[20]The jury consisted of seven African-American jurors and five Caucasian jurors. The accuser, Woolfolk, was an adult African-American male. Graham is a Caucasian Roman Catholic priest. (LF 198).

relationship with Woolfolk's family, that Woolfolk's mother regarded Graham as a son, and that his mother encouraged Woolfolk to interact with Graham. (Tr. 254).

There was no evidence whatsoever to support the prosecutor's gratuitous assertion that in the 1970s, an African-American teenager would not have been believed had he reported the alleged offense. The prosecutor's comments were a deliberate attempt to appeal to racial prejudice and to interject race in a derogatory manner so as to inflame the minds of the jury. "'It is a fundamental concept of the criminal law *that an accused whether guilty or innocent, is entitled to a fair trial,* and so it is the duty of the trial court, and of the prosecuting counsel as well, to see that he gets one, and there must be no conduct by argument, or otherwise, the effect of which is to inflame the prejudices or excite the passions of the jury against him.'" *State v. Long*, 684 S.W.2d 361, 365 (Mo.App.E.D. 1984) (en banc) (emphasis in original) *quoting State v. Tiedt,* 206 S.W.2d 524, 526 (Mo. banc 1947).

In *State v. Long,* the Missouri Court of Appeals commented that where emotions are already inflamed, "all the more restraint [is] required by the prosecutor," who occupies a quasi-judicial position and has a duty to conduct the trial in such manner as will be fair and impartial to the rights of the accused. *Id*. at 365 *citing Tiedt*, 206 S.W.2d at 526, 529. Given the publicity surrounding the "priest abuse scandal" in the Catholic Church, including that intentionally engendered by certain advocacy groups, there is today probably no more challenging environment for a fair trial than the trial of a priest charged with sexual abuse. Yet, the prosecutor exercised no restraint. Instead, he suggested to a predominantly African-American jury that the accuser was targeted

because he was an African American and, therefore, not likely to be believed by others. This was a deliberate and improper appeal to racial animus. *State v. Jackson*, 83 S.W.2d 87, 94 (Mo. 1935) ("appeals to racial prejudice are prejudicial and many times have been held reversible error"); *see also State v. Cabrera*, 700 N.W.2d 469 (Minn. 2005) (error to inject race in closing argument when race is not relevant).

"A prosecutor 'may strike hard blows, [but] he is not at liberty to strike foul ones.'" *State v. Long*, 684 S.W.2d at 365 *quoting* ABA Standards for Criminal Justice, 3-5.8 and 3-5.9. The prosecutor violated his duty in Graham's case by deliberately appealing to the biases of the jury – all without any evidentiary basis whatsoever. *See Long*, 684 S.W.2d at 365-66 (reversing conviction where no evidentiary basis for prosecutor in rape case to refer to venereal disease or possibility that others were laughing at victim, neither of which were part of the evidence). In this case, the prosecutor's improper argument "inject[ed] poison and prejudice into the case" to a degree that warrants a finding of plain error. *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App.W.D. 1989) (personal attack on defense counsel injected such poison and prejudice in case as to amount to plain error requiring reversal of conviction); *see also People v. Lurry*, 395 N.E.2d 1234, 1238 (Ill.App.3Dist. 1979) (prosecutor's statements about black crimes in general and how crimes against blacks are a serious problem in society amounted to plain error and required a new trial).

B.

The Trial Court Erred in Overruling Graham's Trial Objections and Failing to Correct the Prosecutor's Misstatement of Law on the Significance of the Damages Prayer in Woolfolk's Civil Lawsuits.

The prosecution's case against Graham rested on the testimony of the accuser, Lynn Woolfolk. Since the case was tried twenty to thirty years after the alleged events in question, there was no physical evidence and there was no testimonial evidence to either refute or corroborate any significant aspect of Woolfolk's story. The only other prosecution witnesses were Lodermeier, who purportedly learned of Woolfolk's claims in 1994, and the detective who wrote the investigative report following Woolfolk's decision in 2002 to make a report to the Circuit Attorney's Office. Thus, the jury's verdict turned on whether the jury credited the testimony of Woolfolk or that of Graham, a reality that the prosecution also acknowledged. *See, e.g.*, Tr. 598 ("Who do you believe, and that's what this case boils down to . . .").

Against this backdrop – where credibility was the determinative factor – the prosecutor was permitted to argue that Woolfolk did not have a financial motive to fabricate his story because the formal prayer for relief in Woolfolk's civil petition for

damages only asked for "at least $30,000" [21] rather than tens of millions of dollars. Specifically, the prosecutor argued:

> MR. POSTAWKO: Come on, ladies and gentlemen, in this day and age if somebody is out there just for money, they are filing five, 10, 15, 20, 50 million dollar lawsuits. Lynn files a lawsuit for therapy costs.
>
> MR. GOEKE: Your Honor, that misstates the evidence. This misstates the state of the law in Missouri in terms of filing civil suits.
>
> THE COURT: The jury will be guided by their recollection of the evidence as they heard it. The objection is overruled. You may proceed.
>
> MR. POSTAWKO: And you heard it, a lot of questions about these lawsuits. He never filed for anything but for at least $30,000. Okay. At least $30,000. The defense wants you to think, oh, he's a money grubber. He's asking for at least $30,000. . . . You don't file a lawsuit saying give me at least $30,000 and hope you get a lot more.

Tr. 600-01. *See also* Tr. 628 ("[If] Lynn's going to do it he's going to go for these multi million dollar lawsuits, which, come on, ladies and gentlemen, was not done."). Because there was a contemporaneous objection to this argument, the standard of review is abuse of discretion. *State v. Shurn*, 866 S.W.2d 447, 460 (Mo. banc 1993).

The trial court abused its discretion in overruling the defense objections to the

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[21] Although the prosecutor argued that Lynn Woolfolk sought "at least $30,000," in fact, the prayer in the civil lawsuit was for damages of "in excess of $25,000." (LF 159-163).

mischaracterization of the import of the prayer for relief in Woolfolk's civil damages lawsuits. This argument contained misstatements of law and fact that deprived Graham of a fair trial. By suggesting that Woolfolk was not a "money grubber" because he did not file a lawsuit for "five, 10, 15, 20, 50 million dollar[s]," the prosecution ignored Missouri Supreme Court Rule 55.19, which prohibits a civil litigant from including a specific dollar figure in a tort lawsuit. As a result, the jury was substantially misled as to the significance of the damages prayer in Woolfolk's civil lawsuits. The only purpose for requesting damages "in excess of $25,000" in a lawsuit based upon an alleged tort is to ensure that the circuit court has jurisdiction over the matter. If the amount in controversy is less than $25,000, the *associate* circuit court will have jurisdiction over the matter. *See* §517.011 RSMo. Missouri Supreme Court Rule 55.19 expressly prohibits a party with a tort claim from including a specific dollar amount in the demand and states that the "prayer shall be for such damages as are fair and reasonable."

Thus, the prosecutor's statements about the prayer for relief in Woolfolk's civil lawsuit were simply wrong. In one instance, the prosecutor went so far as to state that "[y]ou don't file a lawsuit saying give me at least $30,000 and hope you get a lot more." (Tr. 600-01). However, that is precisely what the Missouri Supreme Court rules require – a prayer for damages in excess of $25,000 with a hope for a lot more. The prayers for relief contained in Woolfolk's 1999 lawsuit are consistent with Missouri rules. On each count of the five-count petition, Woolfolk prays for "damages in an amount in excess of $25,000, *stated for jurisdictional purposes only.*" *See* Certified Copy of Petition, Cause

No. 992-00387 (emphasis added) (LF 152-163). In four of the five counts Woolfolk also requests punitive damages "as are fair and reasonable."

"Misstatements of law are impermissible during closing argument and a trial court has the duty, not discretion, to restrain and purge such arguments." *Bradley v. Waste Management of Missouri, Inc.*, 810 S.W.2d 525, 528 (Mo.App.E.D. 1991). The trial court below failed to discharge its duty to correct the prosecutor's misstatement of law regarding the significance of a damages prayer in a civil lawsuit. Consequently, the jury was erroneously led to believe that the relatively low amount of the damages prayer in the civil lawsuit had some independent significance with respect to Woolfolk's motives when in fact it had none.

Where the trial court overrules an objection that properly charges a misstatement of law, "thereby condoning the misstatement, reversible error is almost inevitable." *Halford v. Yandell*, 558 S.W.2d 400, 412 (Mo.App.W.D. 1977). In this case it is inevitable because the trial court overruled the objection and failed to instruct the jury to disregard a mistake of law by the prosecutor that related to the most critical issue in the case – the credibility of the accuser. The trial court allowed the prosecutor to go so far as to suggest that the accuser's motives were somehow pure because in his civil lawsuit, he was only asking for "accountability" rather than millions of dollars. This mistake substantially prejudiced Graham and deprived him of a fair trial.

C.

The Prosecutor Also Improperly Argued that Any Judgment in the Civil Case Would Have Been Paid by the Archdiocese Rather than Graham.

The trial court also abused its discretion in allowing the prosecution, over objection, to assert that any judgment in the civil case would not have been paid by Graham. Specifically, the prosecutor stated:

> One of the things I've got to throw out right now, part of that deception to get you off the topic, if any lawsuit is filed he [Graham] would not pay one dime, not one dime. You were outright deceived on that. Not one dime out of his pocket. The Archdiocese was sued.
>
> MR. GOEKE: Objection, Your Honor. That is absolutely incorrect.
>
> THE COURT: Retaliatory comments. Overruled.

Tr. 627-28

The trial court erred in allowing the prosecutor to make this argument, and in overruling defense counsel's objection to it, because the prosecutor's statements were not only unsupported by the record, they were untrue. Contrary to the prosecutor's representations, Graham was in fact named as an individual defendant in each of the lawsuits. *See* Certified Copies of Docket Entries from Cause No. 962-07755 and Cause No. 992-00387 (LF 169, 172).

"A prosecutor may not argue facts outside the record." *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995). At trial, there was no evidence in the record regarding the

identity of the defendants in Woolfolk's civil lawsuits. Nor was there any testimony to support the prosecution's contention that any judgment in the civil lawsuit would have been satisfied by the Archdiocese. Allowing the prosecution to make untrue statements that were wholly unsupported by the evidence and that falsely accused the defendant and his counsel of deceit was highly prejudicial, manifestly unjust and deprived defendant of a fair trial.

As this Court observed in *State v. Storey*:

> A prosecutor arguing facts outside the record is highly prejudicial. A prosecutor's assertions of personal knowledge . . . are "apt to carry much weight against the accused when they should carry none" because the jury is aware of the prosecutor's duty to serve justice, not just win the case.

901 S.W.2d 886, 901 (Mo. banc 1995) *quoting Berger v. United States*, 295 U.S. 78, 88 (1935). "This Court has often held that arguing facts outside the record is error warranting reversal." *Storey*, 901 S.W.2d at 901.

D.

The Trial Court Erred in Overruling Graham's Motion for a New Trial Because Numerous Improper and Prejudicial Statements by The Prosecutor Separately and Cumulatively Prejudiced Graham and Deprived Him of a Fair Trial.

The prosecutor deliberately attempted to inflame and prejudice a predominantly African-American jury by suggesting that the accuser, who was also African-American,

was targeted by Graham because in the 1970s, no one would have believed him. The prosecutor improperly attempted to bolster the credibility of his only substantive witness, the accuser, by prejudicially misleading the jury as to the significance of the formal prayer for relief in the accuser's civil lawsuits. Without any evidentiary support whatsoever, the prosecutor argued that Graham had somehow deceived the jury because any damage award in the civil case would have been paid by the Archdiocese rather than Graham. All of these improper statements injected passion, prejudice and misinformation into the case, deprived Graham of a fair trial and had a decisive impact on the verdict. These multiple errors in the prosecutor's argument were cumulative and "egregiously prejudicial" warranting a reversal of the conviction. *E.g.*, *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App.W.D. 1989) (excesses of prosecutor in presenting closing argument were cumulative and required reversal of conviction).

VII.

THE TRIAL COURT ERRED IN ALLOWING MICHELLE TELLE-CAPSTICK AND JOHN ROHAN TO TESTIFY, OVER APPELLANT GRAHAM'S OBJECTION, DURING THE PENALTY PHASE OF THE TRIAL IN THAT THE IDENTITY OF THESE WITNESSES WAS NOT TIMELY DISCLOSED AND THE STATE FAILED TO PROVIDE DISCOVERY REGARDING THESE WITNESSES PURSUANT TO MISSOURI SUPREME COURT RULE 25.03 WHICH DENIED GRAHAM A MEANINGFUL OPPORTUNITY TO WAIVE JURY SENTENCING OR TO CHALLENGE TESTIMONY THAT WAS INHERENTLY UNRELIABLE AND HIGHLY PREJUDICIAL.

A.

The State Failed to Timely Disclose the Identity of its Penalty Phase Witnesses, Michelle Telle-Capstick and John Rohan.

During the penalty phase, witnesses John Rohan and Michelle Telle-Capstick each provided highly prejudicial, uncorroborated, and implausible accounts of other acts of abuse allegedly perpetrated by Graham. Ultimately, the jury recommended a punishment of 20 years of imprisonment after hearing their testimony.

A discussion regarding the proposed testimony of these witnesses was held after the verdict in the guilt phase of the trial. Defense counsel informed the trial court that he had not received an endorsement of any penalty phase witnesses, and that he had only learned of the prosecutor's intent to call Rohan and Capstick the day before. (Tr. 637). The prosecutor responded that he mailed defense counsel a copy of the endorsement

identifying these witnesses in June 2005. However, he conceded that in April 2005 he had made a mistake as to the correct address for defense counsel, and that he did not know the address to which the witness endorsement was mailed. (Tr. 638; Nov. 17, 2005 Tr. 11). The endorsement itself fails to specify the address to which it was sent. Rather, it states only:

> A copy of the foregoing has been delivered to
>
> Chris Goeke, Attorney for the
>
> Defendant, this 3rd day of June, 2004.

(LF 175).

This statement is not sufficient to create a presumption that the endorsement was either sent or received. Such a presumption only arises where there is a written certificate by the counsel making service that the papers have been mailed to named parties at an address certain. *E.g., Zurheide-Hermann, Inc. v. London Square Development Corp.*, 504 S.W.2d 161, 165 (Mo. 1973). The endorsement sent by the prosecutor not only fails to specify the address to which it was sent, it is also dated incorrectly. The document states that it was sent in 2004; however, the Court's file stamp is dated 2005. (Tr. 638-39; LF 175). Consequently, the prosecutor's attempt to comply with his Rule 20.04 obligation to make a written certificate of service is woefully inadequate and does not suffice to create a presumption that the endorsement was sent, let alone received.

Moreover, even if the endorsement somehow gave rise to such a presumption of mailing, that presumption was rebutted by the statements of both defense counsel and the prosecutor. The prosecutor conceded he did not recall the address to which the

endorsement was mailed; defense counsel stated that he did not receive it. (Tr. 637-640; LF 142). A trial court's decision to allow a witness to testify who has not been properly endorsed, like other criminal discovery issues, is subject to an abuse of discretion standard of review. *State v. Taylor*, 944 S.W.2d 925, 932 (Mo. banc 1997). The trial court abused its discretion in allowing Capstick and Rohan to testify because their testimony was highly prejudicial and the late disclosure of these witnesses deprived the defense of a meaningful opportunity to cross-examine them or have their testimony excluded altogether. This Court will overturn the trial court if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted.

B.

The State Failed to Meet its Rule 25.03 Obligations With Respect to Penalty Phase Witnesses John Rohan and Michelle Telle-Capstick.

On or about January 8, 2003, Graham served the State with a Request for Discovery seeking "the name and last known addresses of all persons whom the state intend[ed] to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements, including, but not limited to, all police reports containing such reports or summaries." (LF 174). Capstick testified that she "made a report" to the Circuit Attorney's office, yet no reports or memoranda of such a report were produced by the State. (Tr. 658-59). Rohan testified on cross-examination that he reported his

allegations about Graham to the Bridgeton, Missouri police department. (Tr. 673). Graham was never provided with a copy of this police report; his counsel was ultimately able to obtain a copy by serving a subpoena on the Bridgeton, Missouri police department after the trial. (Nov. 17, 2005 Tr. 15-16; LF 180).

The State has an affirmative obligation to diligently and in good faith obtain discoverable materials "in the possession or control of other governmental personnel." Missouri Supreme Court Rule 25.03(C). The State indisputably failed to discharge this duty. At the hearing on post-trial motions, the prosecutor gave no explanation as to why no materials were produced regarding Capstick. As to Rohan, the prosecutor claimed that he was relying on his understanding that Rohan's police report had been provided to defense counsel by an attorney in the St. Louis County prosecutor's office – effectively conceding that *he* had not produced the report. (Nov. 17, 2005 Tr. 13-14). The prosecutor also conceded that any such discussion with the prosecuting attorney in St. Louis County did not even occur until "around the time of trial." (Nov. 17, 2005 Tr. 15). The prosecutor's reliance on an "understanding" based on a conversation that occurred at or around the time of trial did not meet his obligations under Rule 25.03.

C.

The State's Failure to Timely Disclose these Witnesses Coupled with Its Failure to Comply with its Rule 25.03 Obligations Resulted in Fundamental Unfairness to Graham, Manifest Injustice and a Miscarriage of Justice

As a result of the State's failure to timely disclose its intent to call Rohan and Capstick, the defendant did not have notice, prior to trial, that the State intended to introduce evidence of uncharged bad acts purportedly committed by Graham. "[D]ecisions of this Court require that evidence of unconvicted misconduct is inadmissible where the state does not provide the defendant with notice that it intends to introduce the evidence." *State v. Thompson*, 985 S.W.2d 779, 792 (Mo. banc 1999) (internal citations omitted).

Graham did not have notice, prior to trial, that the State intended to call Rohan and Capstick, let alone advance notice of the substance of their testimony. The State's late disclosure and failure to produce discovery materials precluded not only an opportunity for effective cross-examination of these witnesses but also a meaningful challenge to the admissibility of their testimony. That testimony was extraordinarily prejudicial and unreliable.

It is apparent that the sole purpose of calling Capstick and Rohan was to inflame the passions of the jury. Capstick's testimony, based on 30-odd years of repressed memory suddenly unleashed in a pizza parlor (Tr. 650-52, 661), accused Graham of orally and anally sodomizing her in the rectory during elementary school (Tr. 644-45,

653), and later assaulting her in middle school and high school. (Tr. 653-55). Capstick's fantastic and uncorroborated testimony became even more bizarre when she claimed that the middle school incident was a simultaneous rape and sodomy by Graham and another priest (Tr. 655), and that in the first grade she was raped by yet another priest while being slapped into submission by a nun. (Tr. 656-58, 663).

Rohan, the State's other witness, testified about being frequently taken out of class by Graham when he was in the 6th, 7th or possibly 8th grade and fondled on car rides to the stables while sitting on Graham's lap. (Tr. 667-68). Although this allegedly occurred in the early 1970's, Rohan first made his allegations to the Bridgeton police in 2003. (Tr. 680). His agitation is evident from the transcript and his testimony included spontaneous outbursts calling Graham "bad," "evil" and "manipulative." (Tr. 670-71).

Admission of this testimony worked a miscarriage of justice – the jury recommended a 20-year sentence for a 71-year-old man. In *Thompson*, 985 S.W.2d 779 (Mo. banc 1999), this Court found that admission of evidence of unconvicted misconduct, without adequate notice to the defendant, was plain error. In so holding, the Court noted the extremely prejudicial nature of such evidence:

> Because no jury or judge has previously determined a defendant's guilt for uncharged criminal activity, such evidence is significantly less reliable than evidence related to prior convictions. To the average juror, however, unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions, and a different species from other character evidence.

Thompson, 985 S.W.2d at 792.

There was nothing reliable about the testimony of Capstick and Rohan and Graham was unquestionably prejudiced in his ability to challenge their testimony as a result of the late notice. Had he been able to depose Capstick, he could have moved to exclude her testimony as lacking any indicia of reliability whatsoever. Indeed, it is difficult to believe that the prosecutor could have responsibly called Capstick as a witness had her far-fetched claims been first elicited during a discovery deposition.

As for Rohan, production of the police report regarding his accusations would have not only generated investigative leads to challenge his claims, it also would have provided materials for impeachment and rebuttal. For example, at trial, Rohan claimed to have told his parents of his allegations about Graham (Tr. 668-69). However, in the police report, Rohan's father denied any knowledge of a claim that Graham abused Rohan. (LF 185). The police report also reflects that Rohan failed a polygraph examination as to the veracity of his claim against Graham, which although not necessarily admissible, could well have led to discovery of impeachment evidence. (LF 187)

The State's failure to timely disclose these witnesses also dramatically affected Graham's ability to develop an effective trial strategy. Graham did not learn that the State intended to call witnesses to testify about other bad acts he allegedly committed until after the trial began. Had Graham learned of these witnesses prior to trial, he could have unilaterally waived jury sentencing as was his right under §557.036 RSMo. (Goeke Affidavit, LF 143). After defense counsel learned of these witnesses, he asked that the trial court allow Graham to waive jury sentencing before the penalty phase of the trial

began. The trial court was willing to permit the waiver if the State would consent, which the State declined to do. *Id*. The State's late notice of these witnesses and the substance of their claims against Graham deprived him of the opportunity to make an informed choice whether to waive jury sentencing.

Where, as here, a discovery violation significantly affects a defendant's trial strategy, the trial becomes fundamentally unfair. *E.g.*, *State v. Greer*, 62 S.W.3d 501, 505 (Mo.App.E.D. 2001) (fundamental unfairness occurs in discovery violation cases where defendant is genuinely surprised and surprise prevents meaningful efforts by defendant to consider and prepare a strategy regarding the evidence) *citing State v. Johnston*, 957 S.W.2d 734, 750 (Mo. banc 1997). At a minimum, the 20-year sentence imposed on Graham must be set aside and this case remanded for resentencing.

VIII.

THE TRIAL COURT ERRED IN INVITING THE PROSECUTOR TO MAKE A REBUTTAL ARGUMENT DURING THE PENALTY PHASE OF THE TRIAL AFTER THE PROSECUTOR HAD WAIVED REBUTTAL, AND IN DENYING APPELLANT GRAHAM'S MOTION FOR A NEW TRIAL, BECAUSE GRAHAM WAS DENIED FAIR NOTICE OF THE STATE'S POSITION ON PUNISHMENT IN THAT DEFENSE COUNSEL HAD NO NOTICE THAT THE STATE COULD RESPOND TO HIS RECOMMENDATION OF A TWO-YEAR SENTENCE BY ARGUING IN REBUTTAL FOR A 25 YEAR SENTENCE AND THEREBY DEPRIVE GRAHAM OF ANY OPPORTUNITY TO RESPOND, WHICH RESULTED IN MANIFEST INJUSTICE TO GRAHAM WHO WAS SENTENCED TO THE 20-YEARS OF IMPRISONMENT RECOMMENDED BY THE JURY AFTER THE STATE'S ARGUMENT

Before closing arguments during the punishment phase, the trial court asked the prosecutor whether he wanted to split his time or waive rebuttal "and just make your argument and let him make his argument." (Tr. 717). The prosecutor stated "that's fine." During the prosecutor's initial punishment phase argument, he did not suggest a specific punishment to the jury stating only that the range of punishment for the offense was "on the low end two years or any number of years up to life imprisonment." (Tr. 719). Because the prosecutor had waived his right of rebuttal, defense counsel reasonably expected these comments to be the State's final word on punishment.

Defense counsel relied upon the prosecutor's waiver of rebuttal when he presented his closing argument and concededly would have used a different strategy had he known the prosecutor would be afforded rebuttal notwithstanding his waiver. Specifically, defense counsel would not have suggested a specific punishment of two years imprisonment had he known that the prosecutor would be allowed to present rebuttal argument. (Goeke Affidavit, LF 143-44).

After defense counsel finished his argument, the trial court offered the State an opportunity to respond. For the first time, the prosecutor then argued for a specific sentence of the "25 years that he's put Lynn Woolfolk through since this act." (Tr. 725). As a result of the trial court's improper grant of rebuttal to the State, Father Graham was not put on fair notice of the State's position on punishment and was deprived of the opportunity to respond in closing argument.

This Court has recognized that the State has an obligation to give fair notice in closing argument of its position on punishment so that the defense has a reasonable opportunity to respond. *State v. Peterson*, 423 S.W.2d 825 (Mo. 1968). The normal sequence in penalty phase argument allows the State "the right to open and close the argument." §557.036 RSMo. Under the normal sequence, it may be appropriate for a court to hold that a defendant waives his right to fair notice of the State's position on punishment when he argues for a specific sentence after the State refrained from doing so in the first part of its argument. *Peterson,* 423 S.W.2d at 831. The waiver of the right to fair notice is then knowing. But when the State has indicated its intent to waive rebuttal, the defendant cannot make a knowing waiver of his right to fair notice of the State's

position on punishment by proposing a specific punishment. The defendant has been led to believe by the prosecutor and the court that the State will not respond. Therefore, it was error to afford the State an opportunity for rebuttal after the defendant made his closing argument in reliance on the prosecutor's indication that the State was waiving rebuttal.

Although there was no contemporaneous objection, the trial court's invitation to the State to make a rebuttal argument was plain error. There are "substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995), *quoting* Mo. Sup. Ct. R. 30.20. The jury recommended 20 years of imprisonment for a 71-year-old man with an exemplary history of service and no prior record, all based on Woolfolk's description of events that purportedly took place 20 years before the trial. This sentence recommended by the jury is close to the 25 years the State argued in its surprise rebuttal. As the Court has cautioned, it is virtually impossible to conclude that such argument is not prejudicial.

> [P]rosecutors and trial judges are cautioned that, if the matter of punishment is to be discussed at all, it should be argued in the opening portion of the state's argument in order that defense counsel will have an opportunity to answer that argument. The failure to do so will cause serious risk of reversal for there are not many cases wherein a determination of no prejudice can be made on an appellate level in the area of argument.

State v. Maxie, 513 S.W.2d 338, 345 (1974). In this case it is apparent that the prosecutor's argument on punishment in fact "had a decisive effect on the jury." *State v.*

Davis, 566 S.W.2d 437, 447 (Mo. banc 1978). For this reason, the sentence should be vacated and the case remanded for resentencing.

CONCLUSION

The prosecution of Appellant Thomas Graham was both time-barred and in violation of his rights under the United States and Missouri Constitutions. For these reasons the judgment below should be reversed and this cause remanded with instructions that the indictment be dismissed. The refusal to instruct the jury on the need to find lack of consent or minority, and the trial court's decision to provide State's Exhibit 7 to the jury during deliberations were improper, highly prejudicial, and deprived Graham of a fair trial, which would require reversal even if the prosecution had otherwise been proper. Finally, the imposition of a 20 year sentence was invalid because the late endorsement of the penalty phase witnesses, the State's failure to comply with discovery requirements regarding those witnesses, and the lack of fair notice of the State's position on sentencing, made the penalty phase of the trial fundamentally unfair.

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